Central Law Journal.

ESTABLISHED JANUARY, 1874.

VOL. 39 ST. LOUIS, MO., OCTOBER 26, 1894. No. 17

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The fall term of the United States Supreme Court opened on October 8th. The relief afforded by the establishment of the United States Circuit Courts of Appeal is to be seen in the condition of the docket of the first mentioned court. Taking into account the number of cases filed during the recess, there are now a little over eight hundred cases on the docket. Others will be placed upon it during the term, but in all probability they will not exceed in number those filed during the recess. It is estimated that at the present rate at which business is attended to by the Supreme Court the cases on the calendar will have been disposed of in the space of about two years, so that within a calculable period of time the court will be able to get abreast of current business. This is a decided improvement over the condition of things which had so long obtained, and under which it seemed vain to hope that the court could ever advance beyond a position about three years in arrears of current litigation. If the establishment of the new federal courts of appeal produced no other result than this their creation would have been amply justified.

The Supreme Court of South Carolina, in April last, rendered a decision declaring unconstitutional the so-called dispensary law of that State under which it was exercising a monopoly of the liquor traffic, upon the ground that in no view of the case could the act be regarded as a police regulation, and that even if it could be regarded as such, police power does not include power on the part of the State to engage in carrying on such business. This decision, upon a rehearing, has recently been reversed, the latest decision sustaining the law as a valid exercise of legislative power. The grounds of the court's opinion are, in the first place, that intoxicating liquors are in their nature dangerous to the morals, health, good order and safety of the people, and are not to be placed on the same footing with ordinary commodities, such as corn, wheat, cotton, tobacco, potatoes, etc.; in the second place, that the State under its police power can itself assume entire control and management of subjects, such as intoxicating liquors, even when trade is one of the instruments of such entire control and management on the part of a State; and, finally, that the act of 1893, construed by the court, was a police measure. This change in the attitude of the court is due to a change in its *personnel* since the first decision was rendered. The present conclusion of the court is in accord with the decision of the United States Circuit Court for South Carolina, which last year, in the case of Cantini v. Williams upheld the constitutionality of the statute.

Evidence of other accidents occurring from the same cause is by many courts held to be incompetent. The Supreme Court of Illinois, however, holds to the contrary in the recent case of City of Bloomington v. Legg, 37 N. E. Rep. 696. The court decides such evidence to be competent, not for the purpose of showing independent acts of negligence, but as tending to show that the common cause of these accidents is a dangerous and unsafe thing. They say that where an issue is made as to the safety of any machinery or work of man's construction, which is for practical use, the manner in which it has served that purpose, when put to that use, would be a matter material to the issue; and ordinary experience of that practical use, and the effect of such use, bears directly upon such issue. It no more presents a collateral issue than any other evidence that calls for a reply which bears on the main issue. Such evidence is held competent by the weight of authority. Citing, Coke Co. v. Graham, 35 Ill. 346; City of Chicago v. Powers, 42 Ill. 170; City of Ft. Wayne v. Coombs, 107 Ind. 75, 7 N. E. Rep. 743; City of Topeka v. Sherwood, 39 Kan. 690, 18 Pac. Rep. 933; District of Columbia v. Armes, 107 U. S. 519, 2 Sup. Ct. Rep. 840; Darling v. Westmoreland, 52 N. H. 401. The same rule is adopted in Georgia, Alabama, Connecticut, Minnesota, Michigan, and other States. The Illinois court also holds that in addition to being evidence material to the issue, to show a dangerous condition, it is also evidence material

as tending to show notice. The frequency of such accidents would create a presumption of knowledge, and would be material to the question of diligence used to obviate the cause of injury. The *National Corporation Reporter* properly says, in reference to this case that, to render evidence of other accidents resulting from the same cause competent, it must appear that the instrument or agency, causing the injury, was in substantially the same condition at the time of such other accident, otherwise the evidence is clearly incompetent.

NOTES OF RECENT DECISIONS.

CONTRACT — SALE OF LOTTERY TICKET— PRINCIPAL AND AGENT—PARI DELICTO.—In Mexican International Banking Co. v. Luchtenstein, 37 Pac. Rep. 574, it is held by the Supreme Court of Utah, that a principal cannot recover money received by its alleged agent from the sale of lottery tickets delivered to the latter by the former under an agreement that he shall account for the proceeds. The court says:

The evidence of plaintiff proved that it furnished lottery tickets to the defendant, and that the defendant sold them for the plaintiff, and collected $1,682.75 which he refused to pay over to the plaintiff. The only question raised by the appeal is, can the plaintiff recover of the defendant the money collected by him from the sale of the lottery tickets which he received from plaintiff, and sold for it? The transaction took place in San Francisco. The laws of California were introduced in evidence, and, among other things, provide (Pen. Code, § 321): "Every person who sells, gives, or in any manner whatever furnishes or transfers to or for any other person any ticket, chance, share or interest, or any paper, certificate or instrument purporting or understood to be or to represent any ticket, chance, share or interest in or depending upon the event of any lottery, is guilty of a misdemeanor." It is not denied that the plaintiff and defendant together set about to deliberately violate this statute, and deliberately intended and contrived together to commit, and did commit, the crime inhibited by it. The contention on the part of the respondent is that, the defendant being an agent of plaintiff, and having received these lottery tickets as its agent, and having sold them, he cannot question the right of his principal to an accounting by reason of any defect in their title, or for the reason that in fact no value was parted with when the tickets were sold. The proposition, as stated by respondent in his brief, is as follows: "An agent who has received money from or in behalf of his principal cannot defeat an action brought by the principal to recover it upon the ground that the contract under which the money was paid, or the transaction from which it was realized, or the purpose to which it was devoted, was illegal." Many authorities are cited which sustain this proposition. See Planters' Bank of Tennessee v. Union Bank of Louisiana, 16 Wall. 483; McBlair v. Gibbes, 17 How. 232; Brooks v. Martin, 2 Wall. 70; Mechem, Ag. § 526; Story Ag. p. 620; Armstrong v. Bank, 133 U. S. 433-470, 10 Sup. Ct. Rep. 450. Many other cases are cited, and may be found, which, in a general way, sustain the proposition contended for by the respondent. The real vice of the contention on the part of the respondent—and, it would appear, the real error committed by the trial court in granting the new trial—was in holding that the defendant was an agent of the plaintiff at all. Both these parties, plaintiff and defendant, were engaged in the commission of crime, each actively participating in it. Under our statute, both are principals in that act. No contract between themselves could change their relations, so far as the law is concerned.

Each was actively aiding and assisting in the commission of a crime, and now, having committed the crime, and procured the fruits of the criminal enterprise, they come into the civil courts, and ask the agency of the law in a division and application of the proceeds of their criminal adventure. The question is, can this be permitted? It is not simply a case where the plaintiff, in good conscience, ought not to insist upon the bargain made through an agent with a third person, nor is it a transaction voidable on account of its being against public policy, but the transaction is criminal in itself,—criminal in California, where it was effectuated, and criminal in Utah, where the civil courts are asked to divide the proceeds of the crime. This, it seems to us, is the distinction between the cases cited by the respondent and cases which hold to the doctrine that the civil court, where it finds both parties in equal fault, leaves them in the same condition in which it finds them. Two cases are cited by appellant which appear to be directly in point in this case. Lanahan v. Pattison, 1 Flip. 410, Fed. Rep. Cas. No. 8,036, and Udall v. Metcalf, 5 N. H. 396. Both these cases appear to be exactly alike. The one at bar, and the matter in controversy in each, was money received by a so-called agent for the purchase price of lottery tickets. It was held that the plaintiff, the lottery company, in neither case could recover. The employment of an agent to sell tickets in a lottery is void. See Mecham, Ag. § 38. Therefore, the relation never in fact existed. As we have already stated, both parties are principals. They are both in equal fault, and it would appear to be a monstrous doctrine if participants in crime may invoke the power of the civil courts to determine which of them is entitled to a particular share of the spoils resulting from their criminal adventure. If they may do this in a lottery case, there certainly can be no reason why it may not be done in a case where one steals, and the other receives and sells the stolen goods, there being an agreement to that effect in advance. If an action were filed for an accounting by the thief against the person with whom he had an agreement to receive and sell stolen goods, and who in fact so received and sold them, it is hardly possible that any civil court would hesitate to dismiss such action upon the bare presentation of it. In fact, such cases have arisen, and the solicitors have been punished for contempt for bringing such matters to the attention of the civil courts, and the parties hanged. See Everet v. Williams, 2 Poth. Obl. (by Evans) 3; Spalding v. Preston, 21 Vt. 9. We fail to see any reason why this case does not belong to exactly the same class. This money no more belongs to the plaintiff or defendant than if it had been stolen by one or the other of them, or both. They have simply obtained it by means of a

criminal enterprise, and the degree of crime in no wise changes the relation of the parties to each other. In Sykes v. Beadon, 11 Ch. Div. 195, Lord Eldon said he would not sit to take an account between two robbers on Haunslow heath. No more will we sit to take an account between two thieves from San Francisco, and that is what we are asked to do here. We are clearly of the opinion that it is a matter which ought never to have been brought to the attention of any civil court. The order of the court below granting a new trial is reversed, and the cause remanded to the court below to dismiss the action.

CONTRACT OF INFANT—RECOVERY OF PRICE PAID—FRAUD. — Johnson v. Northwestern Mut. Life Ins. Co., 59 N. W. Rep. 992, decided by the Supreme Court of Minnesota, is an interesting case on the subject of contract of infant, the holdings being that where the personal contract of an infant is fair and reasonable, and free from any fraud, overreaching, or undue influence by the other party, and has been wholly or partly executed on both sides, so that the infant has enjoyed the benefits of it, but has parted with what he received, or the benefits received are of such a nature that he cannot restore them, he cannot recover back what he has paid. But the burden is on the other party to show that the contract was thus fair and reasonable, and free from any fraud or overreaching on his part. If the contract was fraudulent—as, for example, where the other party knowingly secured from the infant a contract which was essentially improvident, and calculated to squander his estate—the infant is entitled to recover back all that he paid. But if the contract was free from any fraud or bad faith, and was otherwise fair and reasonable, except that what the infant paid was in excess of the value of what he received, he can only recover such excess. Gilfillan, C. J., dissents. The court says:

The former opinion laid down the following propositions, to which we still adhere: (1) That the contract of insurance was of benefit to the infant himself, and was not a contract for the benefit of third parties. (2) The contract, so far as appears on its face, was the usual and ordinary one for life insurance, on the customary terms, and was a fair and reasonable one, and free from any fraud, unfairness, or undue influence on part of the defendant, unless the contrary is to be presumed from the fact that it was made with the infant. It is not correct, however, to say that the plaintiff has received no benefit from the contract, or that the defendant has parted with nothing of value under it. True, the plaintiff has received no money, and the defendant has paid none to the plaintiff; but the life of the former was insured for four years, and if he died during that time the defendant would have had to pay the amount of the policy to his estate. The defendant carried the risk all that time, and this is the essence of the contract of insurance. Neither does it follow that the risk has cost the defendant nothing in money because plaintiff himself was not one of those insured who died. The case is therefore one of a voidable or rescindable contract of an infant, partly performed on both sides, the benefits of which the infant has enjoyed, but which he cannot return, and where there is no charge of fraud, unfairness, or undue influence on the part of the other party, unless, as already suggested, it is to be presumed from the fact that the contract was made with an infant. The question is, can the plaintiff recover back what he has paid, assuming that the contract was in all respects fair and reasonable? The opinion heretofore filed held that he can. Without taking time to cite or discuss any of our former decisions, it is sufficient to say that none of them commit this court to such a doctrine. That such a rule goes further than is necessary for the protection of the infant, and would often work gross injustice to those dealing with him, is, to our minds, clear. Suppose a minor engaged in agriculture should hire a man to work on his farm, and to pay him reasonable wages for his services. According to this rule the minor might recover back what he paid, although retaining and enjoying the fruits of the other man's labor. Or, again, suppose a man engaged in mercantile business, with a capital of $5,000, should from time to time, buy and pay for $100,000 worth of goods, in the aggregate, which he had sold, and got his pay. According to this doctrine, he could recover back the $100,000 which he had paid to the various parties from whom he had bought the goods. Not only would such a rule work great injustice to others, but it would be positively injurious to the infant himself. The policy of the law is to shield or protect the infant, and not to debar him from the privilege of contracting. But, if the rule suggested is to obtain, there is no footing on which an adult can deal with him, except for necessaries. Nobody could or would do any business with him. He could not get his life insured. He could not insure his property against fire. He could not hire servants to till his farm. He could not improve or keep up his land or buildings. In short, however advantageous other contracts might be to him, or however much capital he might have, he could do absolutely nothing, except to buy necessaries, because nobody would dare contract with him for anything else. It cannot be that this is the law. Certainly, it ought not to be.

The following propositions are well settled, everywhere, as to the rescindable contracts of an infant, and in that category we include all contracts except for necessaries: First. That, in so far as a contract is executory on part of an infant, he may always interpose his infancy as a defense to an action for its enforcement. He can always use his infancy as a shield. Second. If the contract has been wholly or partly performed on his part, but is wholly executory on part of the other party, the minor therefore having received no benefits from it, he may recover back what he has paid or parted with. Third. Where the contract has been wholly or partly performed on both sides, the infant may always rescind, and recover back what he has paid, upon restoring what he has received. Fourth. A minor, on arriving at full age, may avoid a conveyance of his real estate without being required to place the grantee in *statu quo*, although a different rule has sometimes been adopted by courts of equity when the former infant has applied to them for aid in avoiding his deeds. Whether this distinction between conveyances of real property and personal con-

tracts is founded on a technical rule, or upon considerations of policy growing out of the difference between real and personal property, it is not necessary here to consider. Fifth. Where the contract has been wholly or partly performed on both sides, the infant, if he sues to recover back what he has paid, must always restore what he has received, in so far as he still retains it in specie. Sixth. The courts will always grant an infant relief where the other party has been guilty of fraud or undue influence. As to what would constitute a sufficient ground for relief under this head, and what relief the courts would grant in such cases, we will refer to hereafter.

But suppose that the contract is free from all elements of fraud, unfairness, or overreaching, and the infant has enjoyed the benefits of it, but has spent or disposed of what he has received, or the benefits received are, as in this case, of such a nature that they cannot be restored. Can he recover back what he has paid? It is well settled in England that he cannot. This was held in the leading case of Holmes v. Blogg, 8 Taunt. 508, approved as late as 1890 in Valentini v. Canali, 24 Q. B. Div. 166. Some obliter remarks of the chief justice in Holmes v. Blogg, to the effect that an infant could never recover back money voluntarily paid, were too broad, and have often been disapproved,—a fact which has sometimes led to the erroneous impression that the case itself has been overruled. Corke v. Overton, 10 Bing. 252 (decided by the same court), held that the infant might recover back what he had voluntarily paid, but on the ground that the contract in that case remained wholly executory on part of the other party, and hence the infant had never enjoyed its benefits. In Chitty on Contracts] (volume 1, p. 222), the law stated in accordance with the decision in Holmes v. Blogg, Leake,—a most accurate writer—in his work on Contracts (page 553), sums up the law to the same effect. In this country, Chancellor Kent (2 Kent, Comm. 240), and Reeves in his work on Domestic Relations chapters 2 and 3, tit. "Parent and Child"), state the law in exact accordance with what we may term the "English rule." Parsons, in his work on Contracts (volume 1, p. 322), undoubtedly states the law too broadly, in omitting the qualification, "and enjoys the benefit of it." At least a respectable minority of the American decisions are in full accord with what we have termed the "English rule." See, among others, Riley v. Mallory, 33 Conn. 206; Adams v. Beall, 67 Md. 53, 8 Atl. Rep. 664; Breed v. Judd, 1 Gray, 455. But many —perhaps a majority—of the American decisions, apparently thinking that the English rule does not sufficiently protect the infant, have modified it; and some of them seem to have wholly repudiated it, and to hold that although the contract was in all respects fair and reasonable, and the infant had enjoyed the benefits of it, yet if the infant had spent or parted with what he had received, or if the benefits of it were of such a nature that they could not be restored, still he might recover back what he had paid. The problem with the courts seems to have been, on the one hand, to protect the infant from the improvidence incident to his youth and inexperience, and how, on the other hand, to compel him to conform to the principles of common honesty. The result is that the American authorities—at least the later ones—have fallen into such a condition of conflict and confusion that it is difficult to draw from them any definite or uniform rule. The dissatisfaction with what we have termed the "English rule" seems to be generally based upon the idea that the courts would not grant an infant relief, on the ground of fraud or undue influence, except where they would grant it to an adult on the same grounds, and then only on the same conditions. Many of the cases, we admit, would seem to support this idea. If such were the law, it is obvious that there would be many cases where it would furnish no adequate protection to the infant. Cases may be readily imagined where an infant may have paid for an article several times more than it was worth, or where the contract was of an improvident character, calculated to result in the squandering of his estate, and that fact was known to the other party; and yet, if he was an adult the court would grant him no relief, but leave him to stand the consequences of his own foolish bargain. But to measure the right of an infant in such cases by the same rule that would be applied in the case of an adult would be to fail to give due weight to the disparity between the adult and the infant, or to apply the proper standard of fair dealing due from the former to the latter. Even as between adults, when a transaction is assailed on the ground of fraud, undue influence, etc., their disparity in intelligence and experience, or in any other respect which gives one an ascendency over the other, or tends to prevent the latter from exercising an intelligent and unbiased judgment, is always a vital consideration with the courts. Where a contract is improvident and unfair, courts of equity have frequently inferred fraud from the mere disparity of the parties. If this is true as to adults, the rule ought certainly to be applied with still greater liberality in favor of infants, whom the law deems so incompetent to care for themselves that it holds them incapable of binding themselves by contract, except for necessaries. In view of this disparity of the parties, thus recognized by law, every one who assumes to contract with an infant should be held to the utmost good faith and fair dealing. We further think that this disparity is such as to raise a presumption against the fairness of the contract, and to cast upon the other party the burden of proving that it was a fair and reasonable one, and free from any fraud, undue influence, or overreaching. A similar principle applies to all the relations, where, from disparity of years, intellect, or knowledge, one of the parties to the contract has an ascendency which prevents the other from exercising an unbiased judgment,—as, for example, parent and child, husband and wife, guardian and ward. It is true that the mere fact that a person is dealing with an infant creates no "fiduciary relation" between them, in the proper sense of the term, such as exists between guardian and ward; but we think that he who deals with an infant should be held to substantially the same standard of fair dealing, and be charged with the burden of proving that the contract was in all respects fair and reasonable, and not tainted with any fraud, undue influence, or overreaching on his part. Of course, in this as in all other cases, the degree of disparity between the parties, in age and mental capacity, would be an important consideration. Moreover, if the contract was not in all respects fair and reasonable, the extent to which the infant should recover would depend on the nature and extent of the element of unfairness which characterized the transaction. If the party dealing with the infant was guilty of actual fraud or bad faith, we think the infant should be allowed to recover back all he had paid without making restitution, except, of course, to the extent to which he still retained in specie what he had received. Such a case would be a contract essentially improvident, calculated to facilitate the squandering the infant's estate, and which the other party knew or ought

to have known to be such, for to make such a contract at all with an infant would be fraud. But if the contract was free from any fraud or bad faith, and otherwise reasonable, except that the price paid by the infant was in excess of the value of what he received, his recovery should be limited to the difference between what he paid and what he received. Such cases as Medbury v. Watrous, 7 Hill, 110; Sparman v. Keim, 83 N. Y. 245; and Heath v. Stevens, 48 N. H. 251,—really proceed upon this principle, although they may not distinctly announce it. The objections to this rule are, in our opinion, largely imaginary, for we are confident that in practice it can and will be applied by courts and juries so as to work out substantial justice.

Our conclusion is that where the personal contract of an infant, beneficial to himself, has been wholly or partly executed on both sides, but the infant has disposed of what he has received, or the benefits recovered by him are such that they cannot be restored, he cannot recover back what he has paid, if the contract was a fair and reasonable one, and free from any fraud or bad faith on part of the other party, but that the burden is on the other party to prove that such was the character of the contract; that, if the contract involved the element of actual fraud or bad faith, the infant may recover all he paid or parted with, but if the contract involved no such elements, and was otherwise reasonable and fair, except that what the infant paid was in excess of the value of what he received, his recovery should be limited to such excess. It seems to us that this will sufficiently protect the infant, and at the same time do justice to the other party. Of course, in speaking of contracts beneficial to the infant, we refer to those that are deemed such in contemplation of law.

Applying these rules to the case in hand, we add that life insurance in a solvent company, at the ordinary and usual rates, for an amount reasonably commensurate with the infant's estate, or his financial ability to carry it, is a provident, fair, and reasonable contract, and one which it is entirely proper for an insurance company to make with him, assuming that it practices no fraud or other unlawful means to secure it.

NON-NEGOTIABLE NOTE — INDORSEMENT BY PAYEE — LIABILITY TO SECOND INDORSEE.— The Supreme Court of California in Kendall v. Parker, hold that the payee of a non-negotiable note, who transfers it by indorsement in blank does not become liable as the indorser of a negotiable note would to the indorsee of his indorser, where the second indorsement is also in blank or "without recourse." The court says:

The question here presented is whether, when the payee of a non-negotiable note transfers the same by a simple indorsement in blank, he becomes liable as the indorser of a negotiable note would, not only to his immediate indorsee, but to the indorsee of his indorsee; the second indorsement being also in blank, or, as in this case, "without recourse." It was held in England, prior to the statute of 3 and 4 Anne, that by custom of merchants, when the payee indorsed his name upon a negotiable note, intending thereby to transfer it, the indorsee was at liberty to write over the signature not only of an assignment, but a conditional guaranty of payment. The law thus made for the indorser of such a paper a contract not expressed, and which, independently of the law, there was nothing in the nature of the transaction to indicate. Independently of statute law, there is no custom or rule of law which can add such a condition to the assignment of a non-negotiable note. In many States, however, there are statutory provisions on the subject. In 1850 the legislature of this State passed an act in regard to bills of exchange and promissory notes (St. 1850, p. 247), the first and fourth sections of which are as follows:

"All notes in writing made and signed by any person, whereby he shall promise to pay to any other person or to his order or to the order of any other person or unto the bearer, any sum of money therein mentioned, shall be due and payable as therein expressed, and shall have the same effect and be negotiable in like manner as inland bills of exchange, according to the custom of merchants."

"The payees and indorsees of every such note, payable to them or their order, and the holders of every such note payable to bearer, may maintain actions for the sums of money therein mentioned, against the makers and indorsers of the same respectively, in like manner as in cases of inland bills of exchange, and not otherwise."

In Hamilton v. McDonald, 18 Cal. 128, this court had occasion to consider the liability of an indorser of a non-negotiable promissory note, as affected by that act. There, as here, the action was against the first indorser by the indorsee of the first indorsee. It was contended that the action could not be maintained for want of privity. The court said: "The answer to this objection is to be found in the provisions of the statute regulating the rights and liabilities of the parties. The fourth section of the act of April, 1850, relative to bonds, duebills, etc., makes every assignor of a non-negotiable note liable upon his assignment to the assignee of such note; and it is evident from the language used that it was not the intention to limit this liability to his immediate assignee. The rule at common law was that, as between the assignor and his immediate assignee, the assignment created the same liabilities and obligations on the part of the assignor as the indorsement of a negotiable note created on the part of the indorser. But in respect to the subsequent holders, no privity or connection existed between them and the assignor, unless expressly created by the assignment; and, where this was not done, the immmediate assignee was the only person who could maintain an action in his own name against the assignor. The statute places the subsequent holder upon the same footing with the original assignee, and gives him a right of action against every person from whom the instrument has passed by assignment." It is claimed that this statute was repealed by the Code, and a very different rule established. At common law, however, although the subsequent holder could only sue his immediate indorser in his own name, he could sue the more remote indorser at law in the name of his assignor, or could obtain relief against them in equity in his own name. Story, Prom. Notes, § 128. Whether the statute of 1850 is repealed or not under our practice, it cannot be doubted that such holder may still sue in his own name, if the liability of such indorser is admitted. It may be remarked here that neither under the statute of 1850 nor at common law would the instrument sued upon be considered a promissory note at all. Under the act of 1850 the note was required to be for the payment of a sum of money therein mentioned. According to Blackstone, a promissory note

was an engagement in writing to pay a sum specified. 2 Bl. Comm. 467. Story says it is a written engagement to pay absolutely and unconditionally a certain sum of money (section 1 Prom. Notes), and the author expressly shows that the definition applies both to negotiable and non-negotiable notes (section 3). See, also, Byles, Bills, 5-41; Chit. Bills, 548; 3 Kent, Comm. 74. The instrument is not a promissory note when there may be contingent additions. Smith v. Nightingale, 2 Starkie, 375; Civ. Code, § 3244. The note involved in Hamilton v. McDonald, *supra*, had all the elements of a negotiable note, except that it was not payable to bearer or to order. But has the Code made no change in this matter? Section 3087, Civ. Code, defines a negotiable instrument as "a written promise or request for the payment of a certain sum of money to order or bearer in conformity to the provisions of this Code," and all the provisions of the Code in relation to the liability of drawers and indorsers and in reference to demand, notice, and protest are expressly limited to such instruments. Moreover, section 1774, *Id.*, defines what liabilities one incurs who sells or agrees to sell other choses in action. Originally this section contained a further provision, which was stricken out in 1874, that such seller thereby warrants the instrument to be what it purports to be, and to be binding according to its purport upon all the parties thereto. Some of the liabilities created by this section are identical with those created by section 3116, *Id.*, as to the parties to the assignment of negotiable paper, and others are evidently in lieu of them.

In view of these sections, can it be said that the rule established by the act of 1850 is still in force? Bank Falkenhan, 94 Cal. 141, 29 Pac. Rep. 866, is cited as authority for the judgment entered in this case. That action was brought by the first indorsee against his immediate indorser, and the note was indorsed with an express waiver of protest. This was held to be an indication that the indorser expected to be held as a guarantor. The writer quotes a rule laid down in Gerard v. La Coste, 1 Hare & W. Am. Lead. Cas. 302, note, to the effect that a mere indorsement is but a transfer of the note, and whether any and what liability is incurred by the transfer by indorsement and delivery of such a note will depend upon the intention of the parties and the circumstances of the transaction. It is expressly stated that this rule is sufficient for the case in hand. What follows in regard to an alleged further rule upon the subject must be regarded as *obiter*.

Criminal Law — Robbery—Indictment—Allegation of Value.—It is held by the Supreme Court of Maine in State v. Perley, 30 Atl. Rep. 74, that in an indictment for robbery, a description of the property taken as "certain money and one silver watch and watch chain, of the goods and chattels of said J N E," is sufficient, without further allegation of value. The rule that indictments for larceny must allege the value of the articles stolen is still maintained, because the punishment for larceny is graduated by our statutes with reference to the value of the property taken. There is nothing in the nature of robbery, as defined by the common law, from which it appears that the value of the property taken has ever been deemed of the essence of the crime, and there is no statute in this State which makes the punishment of the offense dependent upon the value of the property taken. The court says:

It is a principle of natural justice, which was early recognized as a fundamental rule of the common law, now incorporated into our constitution as a guaranty of protection to individual rights, that in all criminal prosecutions the accused is entitled to "demand the nature and cause of the accusation" against him. Const. art. 1. No person can be held to answer to a criminal charge until it is "fully, plainly, substantially, and formally described to him." Every material fact which serves to constitute the offense must be expressed with reasonable fullness, directness, and precision. The purpose of this rule is sufficiently obvious. It is to inform the accused of the exact charge against him, and enable the court to determine whether the facts alleged constitutes a crime, and, on proof of them, to render such appropriate judgment as will be a bar to any future prosecution for the same offense. 3 Starkie, Ev. 1527; Com. v. Pray, 13 Pick. 359. "The doctrine of the court," says Mr. Bishop, "is identical with that of reason, viz., that the indictment must contain an allegation of every fact which is legally essential to the punishment to be inflicted." 1 Bish. Cr. Proc. § 81. It is plain, however, that much of the useless tautology and wearisome prolixity which characterized indictments in the early period of criminal procedure can be safely avoided without any infringement of this sacred right of the citizen. It is the policy of our modern courts to encourage a more rational system of pleading, with greater directness and simplicity of statement with less verbiage and needless repetition, and with greater regard for the construction and idioms of the English than for those of the Latin language. In reason, an indictment is best, says Mr. Bishop, when it is "in the fewest and aptest words, with no superfluous matter;" and while, under ordinary circumstances, it would not be judicious to omit anything concerning the necessity of which a question may be raised to embarrass the trial, on the other hand, no allegation, and ordinarily no word, should be introduced which is certainly needless. Bish. Dir. & Forms, §§ 10, 35.

In the case at bar, if the value, of the property named in the indictment is not a necessary ingredient of the offense sought to be charged, and is not "legally essential to the punishment to be inflicted, an allegation of it is "certainly useless," and properly omitted. The precise point has never before been raised in this State, and the court is now at liberty to determine it in accordance with the plain philosophy of the question, and the true science of the pleading.

The indictment charges the offense in the language of the statute as far as permissible under the rule requiring a specification of the property, and other identifying particulars. It does not state, generally, that the defendants took "property that is the subject of larceny," but, specifically, that they took "certain money and one silver watch and watch chain," which are declared by Rev. St. ch. 120, § 1, to be subjects of larceny. It must be observed that there is no provision of this statute which makes the amount of property taken an essential element of the offense;

and there is no statute in this State which creates degrees in robbery, or in any way makes the punishment of the offense dependent upon the value of the property taken.

Nor is there anything in the nature of robbery, as defined by the common law, from which it appears that the value of the property has ever been deemed of the essence of the crime. Blackstone defines it to be "the felonious and forcible taking from the person of another of goods or money, to any value, by violence, or putting him in fear" (4 Bl. Comm. 242); and all the authorities agree that the taking may be of money or goods "of any value." The value of property is therefore quite immaterial. "A penny as well as a pound, forcibly extorted, makes a robbery, the grist of the offense being the force and terror." 2 Arch. Cr. Pl. & Pr. 1287; 3 Co. Inst. 69; 1 Hale, P. C. 532; 1 Hawk. P. C. 212.

True, robbery is characterized by the common law as compound or aggravated larceny. It is "larceny committed by violence from the person of one put in fear." 2 Bisch. Cr. Law, § 1156. And it is the well-settled general doctrine that indictments for larceny must allege the value of the article alleged to have been stolen. It is conceded, however, that this rule had its origin in the practice of distinguishing between grand and petit larceny with reference to the extent of the punishment, that being dependent in some measure upon the value of the article stolen; and it is still maintained because, under our statutes, the punishment for larceny is also graduated with reference to the value of the property stolen. 2 Arch. Cr. Pl. & Pr. 1149, and note; Hope v. Com., 9 Metc. (Mass.) 134; 2 Bish. Cr. Proc. § 713; Rev. St. ch. 120, § 1. But where the value is not essential to the punishment, it need not be distinctly alleged or proved. The jury must be satisfied, however, that the goods were of some value, and they may infer it without separate proof, either from the inspection of the articles, or from the description of them by the witnesses. 2 Bish. Cr. Proc. § 751; Com. v. Burke, 12 Allen, 182; Com. v. Lawless, 103 Mass. 425; State v. Gerrish, 78 Me. 20, 2 Atl. Rep. 129. Upon this point, Mr. Archbold says: "Since the distinction between grand and petit larceny was abolished, it seems to have been no longer necessary to insert the value of the article stolen in indictments, except for stealing to the value of £5 in a dwelling house. It was said, indeed, by some, to be necessary to show that the thing was of some value, but this was sufficiently shown by stating it to be of the goods and chattels of the prosecutor. As it can be of no use, therefore, in any case, to insert it where the value or price is not of the essence of the offense, and as St. 14 & 15 Vict. § 24, ch. 100, sanctions its omission in all other cases, I have, in practice, omitted to insert it, except in the simple case above mentioned." 2 Arch. Cr. Pl. & Pr. 1153.

It is still urged, however, that, upon the theory that robbery is an aggravated larceny, an indictment for robbery should contain the allegation of value, to authorize a conviction of larceny in the event of a failure to prove the aggravation. But this suggestion is sufficiently answered by the statute creating a distinct offense of larceny from the person, the punishment of which does not depend upon the value of the property stolen. Rev. St. ch. 120, § 4. In Com. v. McDonald, 5 Cush. 365, the court says respecting this offense: "As the punishment for stealing from the person does not depend on the amount stolen, there was no occasion for any allegation of value." This is cited with approval in the note to 2 Arch. Cr. Pl. & Pr. 1150; and in Com. v. Burke, 12 Allen, 182, the precise point was directly raised and determined in accordance with the *dictum* in Com. v. McDonald, *supra*. It is clear, therefore, that in an indictment for robbery no allegation of value can be necessary to justify a conviction of the minor offense upon failure to prove the aggravation.

Many other authorities may be cited in support of the proposition, so strongly sustained by reason, that an indictment for robbery is sufficient without an averment of the value of the property taken. In State v. Howerton, 58 Mo. 581, the court says respecting this crime: "The value of the thing taken is not of the essence of the offense. The putting in fear and taking the property constitute the gist of the crime, and there is no necessity for either charging in the indictment or proving at the trial or specifying in the verdict the value of the property." In State v. Burke, 73 N. C. 83, it is said to be unnecessary to allege the value of the property, "since force or fear is the main element of the crime." See, also, Whart. Cr. Law (9th Ed.) § 857; State v. McCune, 5 R. I. 60, 70 Am. Dec. 180, and note; James v. State, 53 Ala. 380; Williams v. State, 10 Tex. App. 8.

The reasoning of the court in Com. v. Cahill, 12 Allen, 540, is not in harmony with Com. v. McDonald and Com. v. Burke, *supra*, from the same State, and cannot be adopted by this court.

THE SERVANT OF ONE MASTER AS THE SPECIAL SERVANT OF ANOTHER.

There is a class of cases, not often referred to, wherein is illustrated the proposition that the general servant of one person may, for a time or temporarily, become the special servant of another master, wherein the same legal results, as to the liability of the master to third persons and to the servant, will govern the temporary relation thus established, as would follow in the case of the general master and servant. In such cases the only question to be determined is, has the servant expressly or impliedly assumed the relation of servant to the special master, and has he placed himself under his direction and control? These propositions are laid down in a number of recent cases. In Willie v. Palmer (N. Y. 1893),[1] a local committee of a city, by letter requested the defendants, manufacturers of fire-works, to send it their catalogue and "mark out a display for the Fourth of July" to cost a stated sum. Defendants did as requested, adding that "we enclose printed sheet giving full instructions for firing the display." The committee, in reply, ordered the fire-works and stated that "we would like to have a man take charge of the display." Defendants answered

[1] 33 N. E. Rep. 381.

that "we understand that we have your positive order for display to cost $400.00 net." Under such contract the defendant shipped the fire-works ordered, to such committee, and sent a man and a boy to aid it in discharging them. The committee had entire control of the display and the man and boy acted under its directions. While such man was arranging the set pieces, the chairman of the committee ordered an associate and the boy to discharge rockets, one of which was fired horizontally by the boy and injured plaintiff. It was held that the boy was the committee's servant, and defendants were not liable. The court used this language: "If the display was that of the committee, as I think it was, then both the man and the boy, though in the general employment of the defendants, were nevertheless servants of the committee and, for the time being, under its direction and control." In Clapp v. Kemp,[2] which was an action for personal injuries, caused by falling through a coal hole connected with the defendant's store, while a teamster of A was delivering coal for the store, the defendants requested the judge to instruct the jury that "If they were satisfied that the injury was caused by the carelessness or negligence of the teamster who unloaded the coal, the plaintiff could not recover unless he was a servant of the defendants and not a servant of A, who furnished the coal. The judge refused so to rule, but among other instructions, not excepted to, gave the following: "That the defendants, if they were occupants of the store, would not be liable for the negligence or carelessness of the teamster, if, as the servant of A, he had the exclusive possession or control of the premises, so far as was necessary to enable him to deliver the coal. But, if the jury are satisfied that the defendants were at the time the occupants of the store, and as such occupants had the right to direct or control the mode or manner of said delivery, then the teamster would be the servant of the defendants, so as to render them liable for injuries occasioned by his negligence or carelessness in the delivery of the coal." It was held that the defendants had no ground of exception. In Kimball v. Cushman,[3] it was held that a person who being in charge of a horse with the assent of its owner and engaged in its business caused an injury by negligent riding, was in the general employment of a third person does not exempt the owner of the horse from liability for injury. The court said: "It is not necessary that he should be shown to have been in the general employment of the defendant, nor that he should be under any special engagement of service to him or entitled to receive compensation from him directly. It is enough that at the time of the accident he was in charge of defendant's property by his assent and authority, engaged in his business and in respect to that property and business under his control. The fact that there is an intermediate party in whose general employment the person whose acts are in question is engaged does not prevent the principal from being held liable for the negligent conduct of the servant."

In McDowell v. Homer-Ramsdell Transportation Co.,[4] it was held by the Supreme Court of New York that one who charters a steamboat with its crew, who were employed by the owner and assumes control of the boat and crew, thereby adopts the crew as his servants. In Brown v. Smith,[5] it was held that when a master has hired his servants to another, giving the latter the complete and absolute control and direction of the servant, the original master is not liable for his negligence although he receives pay for the work so done by him, as he is for the time being the servant of the hirer. In Morgan v. Smith,[6] it was held by the Massachusetts court that the general servant of one person may by submitting to the directions and control of another become the servant of the latter. The court, however, refused to apply the rule in that case because the evidence was wanting that the servant had in fact submitted to such control and direction. In Mound City Paint & Color Co. v. Conlon,[7] it was said that the relation of master and servant exists where the person sought to be charged as master either employed or controlled the servant or had the right of control over him at the time the injury happened, citing Wood on Mast. & Serv.,

[2] 102 Mass. 481.
[3] 103 Mass. 194.
[4] 28 N. Y. Supp. 821.
[5] 86 Ga. 274.
[6] 25 N. E. Rep. 101.
[7] 92 Mo. 221.

§ 306. The principle is thus stated by Cockburn, C. J., in Rourke v. Colliery Co.,[8] "But when one person lends his servant to another for a particular employment, the servant, for anything done in that particular employment, must be dealt with as the servant of the man to whom he is lent, although he remains the general servant of the man who lent him." Lord Herschell in Johnson v. Lindsay,[9] states the doctrine in the following language: "The general servant of A may for a time or on a particular occasion be the servant of B, and a person who is not under any paid contract of service may nevertheless have put himself under the control of an employer to act in the capacity of servant, so as to be regarded as such."

Some of the above cases as will be observed, involve the question of liability of the master to third persons for the acts of the servant. The following cases, however, brought up the question of the liability of the master to the special servant and whether the latter is a fellow-servant within the rule relieving the master from liability for negligence of his other servants. In Hasty v. Sears (Mass.),[10] plaintiff, a carpenter, employed by the hour was sent by his master to repair defendant's elevator, under the direction of defendant's superintendent, and while executing the repairs was injured by the carelessness of the elevator boy. It was held that the plaintiff for the purpose of making the repairs was defendant's servant and in a common employment with the elevator boy and had assumed the ordinary risks thereof, one of which was the boy's carelessness. Barker, J., said: "It is obvious that C. A. Noyes & Co. were not contractors. The transaction between them and the defendant was the loan by them to the defendant of their servant, the plaintiff, who was to be under the control of the defendant by his superintendent while engaged in the work. This made the plaintiff *pro hac vice* a servant of the defendant." The court also calls attention to the fact that the same doctrine has been laid down by them in cases in which one has been held liable for injuries caused by the negligence of a person in the general employment of a third person, but at the time engaged in the defendant's business. Citing Forsythe v. Hooper;[11] Kimball v. Cushman;[12] Clapp v. Kemp;[13] Linnahan v. Rollins;[14] and also in cases in which, the question is whether the person injured and the person whose negligence caused the injury were fellow-servants. Citing Johnson v. Boston;[15] Killia v. Faxon;[16] Ward v. Fibre Co..[17] The court concludes as follows: "The plaintiff and the elevator boy, having both been servants of the defendant at the time of the plaintiff's injury, their employment was common employment, and the negligence of the boy in running the car down upon the plaintiff was an obvious risk of the plaintiff's employment, which he assumed, and for which the defendant is not answerable to him. The plaintiff and the boy were both working to secure the successful operation of the elevator—the plaintiff in repairing it, and the boy in operating the car—and they were forwarding a common enterprise for the benefit of the defendant, and were in a common employment. The case thus comes clearly within the principle that when a man enters into an employment, in the carrying on of which others are engaged with him, he tacitly agrees to accept all the ordinary risks attendant."

Johnson v. Boston,[18] was an action against a city to recover for personal injuries sustained by the plaintiff from the falling in, through the negligence of servants of the city, of the sides of a sewer, which the city was constructing, and in which the plaintiff was at the time engaged in drilling rock. The plaintiff offered to prove that he was in the employ of a man who employed a large number of men and who, in his business of drilling and blasting rock for all persons who employed him, sent his workmen from place to place to do the work; that plaintiff with other servants of his employer, was sent to drill and blast rock in the bottom of the sewer, under the superintendent of a fellow-workmen, who received the same pay as the others; that the workmen were to drill and blast rock in the sewer and in the place pointed out

[8] L. R. 2 C. P. Div. 205.
[9] L. R. 1 App. Cas. 371.
[10] 31 N. E. Rep. 759.
[11] 11 Allen, 419.
[12] 103 Mass. 194.
[13] 102 Mass. 481.
[14] 137 Mass. 123.
[15] 118 Mass. 114.
[16] 125 Mass. 485.
[17] 154 Mass. 419.
[18] 118 Mass. 114.

by the foreman of the sewer department of the city, in charge of the whole work; that all the work except the drilling and blasting was done by the servants of the city; that the whole work, including the drilling and blasting, was under the general supervision of the superintendent of sewers of the city, and under the direct charge of the foreman of the sewer department; that the city paid the plaintiff's employer a certain sum per day for each of his men for the time they were actually employed, and the employer paid his men a less sum each per day, and directed them where to go and what to do, retaining control of them so far that he could change them from one place of work to another and dismiss them. It was held that the plaintiff was a fellow-servant with the servants of the city, whose negligence caused the injury, and that the action could not be maintained. The court said: "The existence of this general relation of master and servant between the plaintiff and Tinkham does not exclude a like relation with the defendant, to the extent of the special service in which he was actually engaged. This was decided in Kimball v. Cushman, 103 Mass. 194, as to the liability of strangers for the negligence of one employed in a special service. The result of the discussion and of the authority cited in Hilliard v. Richardson, 8 Gray, 349, would seem to be that, while engaged upon the work of excavating the sewer, the plaintiff was the servant of the defendant, so far as to make the defendant liable to strangers for his negligent conduct in that work. He must also be regarded as in the service of the defendant, so as to make him a fellow-servant with the foremen and other workmen engaged in excavating the sewer. The reason usually assigned for a rule in regard to fellow-servants, that in entering the service each one is presumed to take into account all the ordinary risks of the business upon which he enters, including the negligence of fellow-servants, applies to the plaintiff as well as it would to his immediate or general employer, Tinkham. If his engagement with Tinkham did not contemplate a temporary transfer of his service to the control and direction of others, as he is while transferred to that of defendant's foreman upon this work, then he himself, by assenting to that transfer and voluntarily engaging in the work as a servant of the defendant, assumed the liabilities and consequences that followed from the existence of that relation. The case of Wiggett v. Fox[19] is directly in point."

In Evans v. Lippencott,[20] the defendant owned a saw mill and gave an order to D & W, master machinists, to make some alterations in the gearing of the water wheel of his mill. D & W sent the plaintiff and another workman to do the work. It was understood between these workmen and the defendant that the mill would run at such times as they were not actually at work upon the wheel. While they were at work upon the wheel the engineer of the defendant negligently started the wheel, injuring the plaintiff. It was held that plaintiff was a servant of the defendant engaged in a common employment with the engineer. The court says: "An examination of the cases in which the character of a servant has been considered will, however, disclose the fact that there is no legal test of service by which in all cases it can be determined whether an employee is a servant. He may be a servant for one purpose and a volunteer or contractor for a different purpose. He may be the servant of one master viewed in one aspect, and at the same time be considered as the servant of another person for the purposes of carrying out a legal policy." * * * "The owner of the mill had the control of the workmen to the same degree that he would have had over the masters of the workmen had they done the work personally. He had the power to direct the work in regard to the extent and character of the alterations, and in respect to the time at which and the circumstances under which it was to be done. Had an injury resulted to a third person by reason of the negligent act of such workmen while acting within the line of employment for which D & W had been engaged, there could be no doubt that the defendant would have been liable to the injured persons."

In Morgan v. Smith,[21] the Supreme Court of Massachusetts uses this language: "There is no doubt that the general servant of one person may become the servant of another, by submitting himself to the control and di-

[19] 11 Exch. 832.
[20] 47 N. J. L. 192, 54 Amer. Rep. 155, with note.
[21] 35 N. E. Rep. 101.

rection of the other. In such a case, the servant becomes the fellow-servant of the servants of the person under whose control he comes; and neither his general master nor his special master is liable if he is injured by the negligence of one of the other servants." The court also cites with approval the language of Lord Watson in Johnson v. Lindsay,[22] as follows: "I can well conceive that the general servant of A might, by working towards a common end along with the servants of B, and submitting himself to the control and orders of B, become *pro hac vice* B's servant, in such sense as not only to disable him from recovering from B for injuries sustained through the fault of B's proper servants, but to exclude the liability of A for injury occasioned by his fault to B's common workmen. In order to produce that result the circumstances must, in my opinion, be such as to show conclusively that the servant submitted himself to the control of another person than his proper master, and either expressly or impliedly consented to accept that other person as his master for the purpose of the common employment."

Killea v. Faxon,[23] was an action for personal injuries caused by the fall of a staging, upon which the plaintiff was at work as a coppersmith, putting up gutters on a building, while he was, as alleged in the declaration, in the employ of the defendants, the evidence tending to show that the defendants were repairing the building, and employed a skillful carpenter to superintend the whole job. When the time came for putting up the gutters, A, one of the defendants, told the carpenter that he wanted a staging put up, and the staging, for the sole purpose of putting on the gutters, was erected under the direction of the carpenter, who used his own brackets to support it; that the brackets were insecurely fastened to the building; that on the next day A ordered the gutters of a coppersmith and directed him to send a man to put them up; and that the plaintiff was thus sent, and when he arrived was directed by A where to go to work upon the staging which fell, causing the injuries. It was held that the only negligence was that of the carpenter, a fellow-servant, and that the action could not be maintained. In Ward v. Fibre Co.,[24] the doctrine was recognized in the following language: "The defendant corporation contends that, although he was in the general service of M & W, and received his pay from them, he consented that they should set him to do the defendant's work, * * * to be managed and directed by the defendant during its progress. If this were so, he would be the defendant's servant in the particular business, notwithstanding that in a general sense he was a servant of M & W." In Rourke v. The White Moss Colliery Co.,[25] defendants having begun sinking a shaft in their colliery, for which purpose they had fixed an engine near the mouth of the shaft, agreed with W to do the sinking and excavating at a certain price per yard, W to find all labor, the defendants to provide and place at the disposal of W the necessary engine power, ropes, with an engineer to work the engine (who was employed and paid by defendants), the engine and engineer to be under the control of W. The plaintiff, who was one of the men employed and paid by W, while working at bottom of shaft was injured by negligence of engineer. Held, that though the engineer remained the general servant of defendants, yet under the orders and control of W, at time of accident, he was acting as the servant of W and not of defendants, who were therefore not liable for his negligence. In Illinois Central R. R. Co. v. Cox,[26] where there was a contract to deliver wood to a railway company the latter to furnish the equipment to move it, the men on the train to obey the orders of the contractor, and where one of the servants employed by him to load wood upon the car was thrown off and killed, it was held that the parties were all servants of the company and no recovery could be had.

LYNE S. METCALFE, JR.

St. Louis.

[22] L. R. 1 App. Cas. 371.
[23] 125 Mass. 485.
[24] 154 Mass. 419.
[25] L. R. 2 C. P. 205, affirming same case, 1 C. P. 556.
[26] 21 Ill. 20.

MECHANICS' LIENS—ASSIGNMENT OF CLAIM —STATEMENT OF CLAIM.

KINNEY V. DULUTH ORE CO.

Supreme Court of Minnesota, August 16, 1894.

1. The proper transfer of a claim or demand, the payment of which may be enforced under the provisions of the mechanic's lien law (Gen. Laws 1889, ch.

200), operates as an assignment of the right to a lien, including the right of the transferee to file the lien statement in his own name.

2. Such transferee or assignee may include more than one claim or demand in the same lien statement, providing the requirements of the statute are complied with as to each.

COLLINS, J.: The questions here presented for determination are —First, does the proper transfer of a claim or demand, the payment of which may be enforced under the provisions of the mechanic's lien law (Gen. Laws 1889, ch. 200), operate as an assignment of the right to a lien, including the right of the transferee to file the lien statement in his own name? and, second, if the first question be answered in the affirmative, can such transferee or assignee include more than one claim or demand in the same lien statement?

1. There is nothing in the statute, as there is in the statutes of some States, which forbids, directly or by implication, the assignment of such claims and demands; and it was held more than 25 years ago, in Tuttle v. Howe, 14 Minn. 145 (Gil. 113), that a lien claim was capable of assignment, although in that case the required affidavit for a lien had been filed by the original creditor prior to the assignment. In that opinion, attention was called to section 14 of the then existing lien law, which gave to executors and administrators, as does section 17 of the law of 1889, the same rights as their testator or intestate would be entitled to, if living, and the well-settled general rule that whatever rights of action or of property survive to an executor or administrator are assignable was referred to and relied upon. No one would dispute the right of an executor or an administrator to file the lien statement required by the present statute, and if such be the case it logically follows that the assignee of the lien may make and file the lien statement. There is no good reason why the right to the lien should not be assignable before as well as after the statement has been filed, and there is an abundance of reasons why, if the right be assigned, the assignee should thereafter take all necessary steps required to preserve and collect his claim. He must not be put at the mercy of his assignor, who might or might not choose to make or file the statement. It is elementary that the assignment of a debt carries with it all the liens, securities, and remedies which the assignor held or might have employed to enforce its payment, in the absence of a statute to the contrary. There has been some quibbling in the courts to avoid the application of this rule where the transfer has been of a claim or demand to which the right of lien attached. We are not inclined to follow the cases in which application of the rule has been denied. A summary of the decisions of the various States on the subject of the assignability of this class of debts and the result of such assignments may be found in Phil. Mech. Liens (3d Ed.) §§ 54-56.

2. We are clearly of the opinion that the lien statement may cover and include more than one claim or demand, providing the requirements of the statute are complied with as to each. Expense and trouble is thus saved, the procedure is directly in line with that provision of the statute which compels the bringing of all lien claimants into one action, and the object of the law is fully accomplished. Although the facts are not the same, the case, on this point, is governed by Benjamin v. Wilson, 34 Minn. 517, 26 N. W. Rep. 725. Order reversed.

NOTE—*Transferability of the Right to File a Mechanic's Lien.*—Great diversity of opinion exists as to the assignability of mechanics' liens. Three different rules seem to be adopted in the several States. 1st, that the lien is personal and cannot be assigned. 2nd, that the proceedings to be taken to enforce the lien must be in the name of the assignor, but subject to those restrictions the lien is assignable. 3d, that the lien is as assignable as any other debt, and the proceedings may, if allowed by the practice in other suits, be brought in the name of the assignee. This contrariety has arisen from the interpretation of the different lien laws of the several States, qualified by the general practice as to the assignability of choses in action. Philips on Mech. Liens, 3d Ed. § 54. It has been decided in the following cases that the lien is a personal privilege and not assignable. Fitzgerald v. First Presb. Church, 1 Mich. (N. P.) 243; Dano v. M. G. & R. R. R. Co., 27 Ark. 566; Goodman v. Pence, 21 Neb. 459; Brown v. Chicago, etc. Ry. Co., 36 Mo. App. 458; Davis v. Bilsland, 18 Wall. 659; Tewkbury v. Bronson, 48 Wis. 581; Brown v. Harper, 4 Oreg. 89; Rollin v. Cross, 45 N. Y. 766; First Nat. Bank v. Day, 52 Iowa, 680; Brown v. Smith, 55 Iowa, 31; Pearsons v. Tinker, 36 Me. 384; Ruggles v. Walker, 34 Vt. 468. In a number of States it has been held that the lien is assignable but proceedings to enforce it must be in the name of the assignor. Phoenix Mut. Ins. Co. v. Batcher, 6 Bradw. (Ill.) 621; Cairo & Vincennes R. R. Co. v. Fackney, 78 Ill. 1192, and see Brown v. Smith, 55 Iowa, 32; Murphy v. Adams, 71 Me. 118; Phillips v. Vose, 81 Me. 134; Midland R. Co. v. Wilcox, 122 Ind. 84. In other States it is held that right of lien is as assignable as any other debt. Tuttle v. Howe, 14 Minn. 145; Iaege v. Bossieux, 15 Gratt. (Va.) 83; Stewart v. Preston, 1 Fla. 10; Page v. Pierce, 6 Fost. (N. H.) 317; Skyrme v. Occidental Mill, 8 Nev. 219; Rogers v. Omaha Hotel Co., 4 Neb. 54; Mason v. Germaine, 1 Mont. 263; Burnett v. Jersey City, 31 N. J. Eq. 341. A late decision of the Supreme Court of California is in the accord with the last mentioned cases holding that a right to a lien passes by the assignment of the debt under which it was acquired. The court after discussing the Code upon the subject says that "independently of the provisions of our Code, we should be strongly inclined to the conclusion above expressed. The conflict upon the subject has doubtless largely arisen from a failure to distinguish between common-law liens, to the existence of which possession, actual or constructive, is necessary, and those liens of purely statutory origin which had no existence at common law. In the case of Rogers v. Hotel Co., 4 Neb. 57, the court, in discussing a lien given by the statute, point out this distinction, saying: 'Liens of this kind are clearly defined and regulated in the civil law, but were unknown to the common law. The proceeding is entirely statutory

At common law, the assignment of a chose in action was entirely prohibited. Section 30 of the Code of Civil Procedure provides that the assignee of a thing in action may maintain an action thereon in his own behalf, or the name of the assignor. An action of this kind can be maintained by the assignee, unless the lien is strictly personal, so that it is lost the moment it is transferred. Its continuance in no sense depends on retaining possession of the property. It is as complete and ample security for the payment of the debt as a mortgage of the same interest. It depends on no contingency for its continuance during the time prescribed by the statute.' In Kerr v. Moore, 54 Miss. 288, speaking of a laborer's lien under the agricultural lien law, the court said: 'The lien given by law to the laborer for his wages has been properly likened to that of a mechanic or material man for what is due him. The decided weight of authority and reasoning, according to our view, is in favor of the assignability of the lien of a mechanic, and the right of his assignee to assert his claim and enforce the lien in the same manner and to the same extent that the mechanic could.' This view was sustained by the following authorities: Iaege v. Bossieux, 15 Grat. 83; Tuttle v. Howe, 14 Minn. 150 (Gil. 113); Skyrme v. Mining Co., 8 Nev. 219; Davis v. Bilsland, 18 Wall. 659; Ritter v. Stevenson, 7 Cal. 388; Phil. Mech. Liens, § 55.

This view better accords with the general policy of our law, and the spirit and purpose of the act which gives the laborer a lien, than the contrary view. Liens which are not merely declaratory of the common law do not require possession to support them. They have the same operation without possession, and the same efficacy as common-law liens have with possession, and the assignment of the claim carries with it the right to the lien. If the existence of the lien does not depend upon possession, it may be assigned. 1 Jones, Liens, §§ 104, 990. The cases relied upon by appellants do not support their contention. In Mills v. Land Co., 97 Cal. 254, 32 Pac. Rep. 169, the court simply held that the mere right of a laborer or material man to create a lien under the mechanic's lien law is a personal right, which cannot be assigned. This is obviously correct, since, until perfected by filing proper notice, it is a mere inchoate right, personal to the individual, which he may choose to perfect or not at his pleasure, and which until perfected has no tangible existence as property, and, of course, as such, is not the subject of transfer. In Rollin v. Cross, 45 N. Y. 771, the plaintiff filed a lien for the amount of all the work done and materials furnished, both by Pick, the original contractor, before assignment, and by himself, as assignee of the contract, and the court held that the statute did not authorize a lien to be perfected by other than the one to whom the right is given by the statute. The Iowa cases are to the same effect. But the assignability of the liens of mechanics and material men, given under our statute, when duly perfected, has been sustained in this State since an early date. In Brock v. Bruce, 5 Cal. 280, it was held that the mechanic's lien law created a sort of mortgage or security, which follows the original debt or obligation; and in Ritter v. Stevenson, 7 Cal. 388, the rule applicable to the assignment of mortgage liens by assignment of the note or debt was applied to assignments of mechanics' liens. The lien under consideration, being a perfected security, is within the reason of the rule laid down in these cases."

BOOKS RECEIVED.

International Copyright Edition. Principles of the Law of Real Property, Intended as a First Book for the Use of Students in Conveyancing. By the Late Joshua Williams. The Seventeenth Edition Re-arranged and Partly Re-written by his Son, T. Cyprian Williams. With American Notes by Harry B. Hutchins, Professor of Law in Cornell University. London: Sweet & Maxwell, Limited. Boston: The Boston Book Company. 1894.

The American Digest. (Annual, 1894.) Being Volume 8 of the United States Digest Third Series Annuals. Also, the Complete Digest for 1894. A Digest of all the Decisions of all the United States Courts, the Courts of Last Resort of all the States and Territories, and the intermediate Courts of New York State, Pennsylvania, Ohio, Illinois, Indiana, Missouri, Texas and Colorado, U. S. Court of Claims, Court of Appeals and Supreme Court of the District of Columbia, etc., as Reported in the National Reporter System and elsewhere from September 1, 1893, to August 31, 1894. With Notes of English and Canadian Cases, etc., A List of the Reports Included. A Table of the Cases Digested and a Table of the Cases Overruled, Criticised, Followed, Distinguished, etc., during the Year. Prepared and Edited by the Editorial Staff of the National Reporter System. St. Paul, Minn.: West Publishing Co. 1894.

HUMORS OF THE LAW.

An old judge of the New York Supreme Court, meeting a friend in a neighboring village, exclaimed, "Why, what are you doing here?" "I'm at work trying to make an honest living," was the reply. "Then you'll succeed," said the judge, for you have no competition."—*Green Bag.*

It has not been so very long since the old English court rules passed out of observance, and when they were in vogue, nowhere were they more strictly observed than in South Carolina. The rules provided that a lawyer, when he spoke in court, must wear a black gown and coat, and that the sheriff must wear a cocked hat and sword. On one occasion a lawyer named Pettigrue arose to speak in a case on trial.

"Mr. Pettigrue," said the judge, "you have on a light coat. You cannot speak, sir."

"Oh, your honor," Pettigrue replied, "may it please the court, I conform to the law."

"No, Mr. Pettigrue," declared the judge, "you have on a light coat. You cannot speak."

"But your honor," insisted the lawyer, "you misinterpret. Allow me to illustrate: The law says the barrister must wear a black gown and coat, does it not?"

"Yes," replied the judge.

"And does your honor hold that it means that both gown and coat must be black?"

"Certainly, Mr. Pettigrue, certainly, sir," answered his honor.

"And the law further says," continued Mr. Pettigrue, "that the sheriff must wear a cocked hat and sword, does it not."

"Yes, yes, Mr. Pettigrue," the court answered somewhat impatiently.

"And do you mean to say, your honor," queried Pettigrue, "that the sword must be cocked as well as the hat?"

"Er—eh?—er-h'm," mused his honor. "You may continue your speech, Mr. Pettigrue."—*Green Bag.*

WEEKLY DIGEST

Of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of the Supreme, Circuit and District Courts of the United States, except those that are Published in Full or Commented upon in our Notes of Recent Decisions.

1. ADMIRALTY—Conflicting State and Federal Jurisdiction—Maritime Liens.—A steamship, owned by an insolvent corporation, and in possession of a receiver of its property appointed by a State Court, was employed by him, under authority of the court, in transporting merchandise and passengers, in connection with the usual business of the corporation, between a port in the State and a port in another State: Held, that the vessel was not exempt, by the rule of comity, as in *custodia legis*, from maritime liens for liabilities incurred in such other State in the course of such employment, nor from seizure for enforcement of such liens upon libels in a United States District Court in that State, without leave of the court appointing the receiver, she having been engaged, when the liens were incurred, as a common carrier in trade and commerce, and the State and Federal Courts not having co ordinate or concurrent territorial jurisdiction.—THE WILLAMETTE VALLEY, U. S. D. C. (Cal.), 62 Fed. Rep. 293.

2. ADVERSE POSSESSION—Continuity.—Where a person in possession of farm land sells the same in December, and it remains unoccupied for two months, at which time the tenant of the purchaser takes possession, such interruption of actual occupation does not break the continuity of possession, unless there is evidence of an intention to abandon the possession.—GARY v. WOODHAM, Ala., 15 South. Rep. 840.

3. ADVERSE POSSESSION.—Where a grantee of land erects a mill on it, and, with the knowledge and acquiescence of his grantor, builds a dam on the grantor's land, and floods a part of it, all his or his successor's acts, in the way of repairing or re-building the dam, are to be referred to an intention to maintain the prescriptive easement, and are no foundation for a title by adverse possession to the land flooded.—COSTELLO v. HARRIS, Penn., 29 Atl. Rep. 874.

4. ADVERSE POSSESSION—Rights of Trustee.—A trustee obtains no title by adverse possession against the *cestui que trust*.—GARDNER v. HOLLAND, S. Car., 19 S. E. Rep. 997.

5. ALTERATION OF INSTRUMENT—Burden of Proof.—Where a bond or other obligation with sureties is unauthorizedly altered after execution by a stranger to such instrument, without the knowledge, sanction, connivance, or procurement of the payee, such alteration, as between the payee and sureties, will not avoid the instrument and release the sureties, but it remains in full force as it stood in its original form prior to its alteration.—CITY OF ORLANDO v. GOODING, Fla., 15 South. Rep. 770.

6. APPEAL BOND.—Where a surety on an appeal bond disposes of his property pending the appeal, the court cannot require appellant to file a new bond, in the absence of a statute authorizing it to do so.—MACOMBER v. CONDRADT, Cal., 37 Pac. Rep. 382.

7. APPEAL—Judgment at Law.—Appeal does not lie from a judgment in an action at law, a writ of error being the only mode of review.—STEVENS v. CLARK, U. S. C. C. OF APP., 62 Fed. Rep. 321.

8. APPEAL.—An appeal from a judgment distributing among various claimants a fund due from a city to a contractor is not affected by a stipulation, entered into pending an appeal, authorizing payment by the city of a portion of the fund as directed by the judgment, when the parties did not intend to abandon their appeal as to the residue.—CITY OF SEATTLE v. LIBERMAN, Wash., 37 Pac. Rep. 433.

9. APPEALABLE JUDGMENTS AND ORDERS—Denial of Rehearing.—After a decree finally disallowing a claim to a fund in court, a rehearing was asked, on grounds involving the correctness and regularity, not the validity, of the decree: Held, that the petition therefor could not be regarded as a petition to vacate the decree as void, and an order dismissing the petition was not appealable.—BONDHOLDERS AND PURCHASERS OF THE IRON RAILROAD v. TOLEDO, D. & B. R. CO., U. S. C. C. OF APP., 62 Fed. Rep. 166.

10. ASSIGNMENT FOR CREDITORS — Validity.—A trust deed conveying all of a debtor's property to a trustee for the benefit of all the grantor's creditors, without preferences, is not *prima facie* fraudulent, under Code, art. 47, § 24, which provides that if any conveyance be made of any goods by certain persons, when insolvent, the same shall be *prima facie* intended to delay creditors, and the burden of proving the *bona fides* of the transaction is on the grantor and grantee, this being aimed only at conveyances hindering creditors.—PFAFF v. PRAY, Md., 29 Atl. Rep. 824.

11. ASSIGNMENT FOR BENEFIT OF CREDITORS.—A deed of assignment, void as to creditors generally, may be good as between the immediate parties; and when property in the hands of an assignee for the benefit of creditor is attached as the property of the assignor, and a suit is instituted by the assignee against the sheriff to recover the value of the attached property, before such officer can attack the assignment as fraudulent and void he must show that he has taken the property under a valid attachment at the suit of a creditor of the assignor, and that he has pursued the statutory steps in relation thereto subsequent to the seizure of the same.—DAWLEY v. SHERWIN, S. Dak., 59 N. W. Rep. 1027.

12. ATTACHMENT BOND—Insolvent of Sureties.—Code, § 2998, provides that plaintiff in attachment, before or during the trial, may amend any defect of form or of substance in the bond, "and no attachment must be dismissed for any defect in the bond," if a sufficient bond is given: Held, that where the sureties on an attachment bond became insolvent, to the knowledge of the court, it may require an additional bond, with good sureties.—EX PARTE DAMON, Ala., 15 South. Rep. 862.

13. ATTACHMENT—Claims of Third Persons.—A claimant in attachment must fail unless the facts which support his title existed when the claim was interposed.—SEISEL v. FOLMAR, Ala., 15 South. Rep. 850.

14. BANKS—Stockholder—Interest.—A stockholder in a bank is not entitled to interest from the bank, either

on ordinary dividends declared on his shares or on money due him from a reduction by the bank of its capital stock, for a period during which the bank was prevented from paying him the same by attachments of his stock in suits pending in court between him and other parties, although the money thus belonging to him was during such time mingled by the bank with its general assets, the bank being ready and willing to pay over the same but for the attachments, and having on hand all the time a balance of money sufficient for the purpose.--MUSTARD V. UNION NAT. BANK, Me., 29 Atl. Rep. 977.

15. BILL OF EXCEPTIONS—Time of Signing.—A bill of exceptions which bears no date will not be considered on appeal, where the record fails to show either that it was signed in term time, or that by agreement of parties it was signed in vacation.—MORRIS V. BRANNEN, Ala., 15 South. Rep. 865.

16. BUILDING AND LOAN ASSOCIATIONS — Usury.—A member of a building and loan association who paid 32 per cent. premium for a loan, and 6 per cent. per annum on the amount thereof, and who voluntarily made a settlement, receiving credit for 72-100 of the premium paid, and his share of the profits, cannot complain that the transaction is usurious, as he received his share of the interest paid by all the members.—NATCHEZ BLDG. & LOAN ASS'N V. SHIELDS, Miss., 15 South. Rep. 793.

17. CARRIERS—Acceptance of Goods—Bills of Lading.—The agent of a steamboat line signed a bill of lading for cotton as shipped "on board the good steamboat called ——, or any other boat in the employ of same line," the name of steamboat being left blank: Held, that the rights of parties under it were not affected by Act Miss. March 16, 1886, making "every bill of lading acknowledging the receipt" of goods conclusive evidence, in the hands of *bona fide* holders, that the goods were actually received for transportation, as there was no acknowledgment of the receipt of any cotton, or its shipment on any named boat.—THE GUIDING STAR, U. S. C. C. of App., 62 Fed. Rep. 407.

18. CARRIERS — Palace Car Companies. — Plaintiffs, having tickets for passage over a railroad, purchased from a palace car company a ticket for the drawing-room of one of its cars, part of a railroad train going to their destination. Before arriving there the train was turned back by the railroad officials, because of a washout on the road, and plaintiffs were ejected from the car by order of the conductor of the train. By contract between the palace car company and the railroad company, the drawing room car was operated and controlled by the railroad company: Held, that plaintiffs could not recover damages from the palace car company as for breach of a contract to convey them to their destination, that company not being a common carrier of passengers for hire, and having made no contract to carry; its obligation being only to accommodate them with the drawing-room in its car so long as the carrier would convey it.—DUVAL V. PULLMAN PALACE CAR CO., U. S. C. C. of App., 62 Fed. Rep. 265.

19. CARRIERS—Passenger—Damages.—Where a ticket agent, who has authority to sell both limited and unlimited tickets over a connecting line, gives a passenger a ticket which he takes without reading, and which recites on its face that it is limited, evidence that the passenger contracted for a ticket which would allow him stop-over privileges is admissible, though the ticket also recites that no agent has authority to change the conditions thereof.—GALVESTON, H. & S. A. RY. CO. V. KINNEBREW, Tex., 27 S. W. Rep. 631.

20. CONSTITUTIONAL LAW—Classification of Counties.—Laws 1893, § 235, which provides that when the population of any county shall have been reduced, by the creation of any new county from the territory thereof, below the class first assumed under the act, the supervisors of such county shall designate by order the class to which such county has been reduced, is not in conflict with Const. art. 11, § 5, which provides that the legislature, by general laws, shall classify the counties by population, as it does not delegate to supervisors the power to classify counties, but simply authorizes them to determine how many people are left within the old county after the new county is created.—KUMLER V. BOARD OF SUP'RS OF SAN BERNARDINO COUNTY, Cal., 37 Pac. Rep. 383.

21. CONTRACT — Construction.— A contract between plaintiffs and the B. & O. R. Co., for masonary work in certain bridges, provided that "B & O. specifications" were to govern, etc. The company had in use a regular form of construction contract, containing an agreement that the company might, at any time, suspend the execution of or annul the contract, on giving——days' notice, without liability for any damage. Plaintiffs had signed such a contract about five years previous, and worked under it: Held, that the use of the words "B & O. specifications to govern" did not import into the contract with plaintiffs the agreement that the company might suspend work or annul the contract, etc.—BALTIMORE & O. R. CO. V. STEWART, Md., 29 Atl. Rep. 964.

22. CONTRACT — Defective Performance. —The fact that work is defectively done is no defense to an action for the contract price thereof, unless defendant proves the damages resulting from such work.—SHEPPARD V. DOWLING, Ala., 15 South. Rep. 846.

23. CONTRACTS—Rescission.—Plaintiff sold his stock in K corporation to defendant corporation for preferred stock in defendant corporation, it being provided that the preferred stock should bear 7 per cent. interest, payable semi-annually: Held, that the failure to pay the interest or dividends semi-annually, in the absence of profits with which to do so, was not a substantial breach of the contract, and would not authorize a rescission of the sale within the four years.—FELD V. ROANOKE INV. CO., Mo., 27 S. W. Rep. 635.

24. CORPORATIONS — Contract of Directors.— Where two of three directors of a corporation, without authority from the board, make a contract of employment, and the third director, after hearing of its terms, allows the employee, without objection, to continue work for four months, it will be presumed that the directors ratified the contract.— FINNEGAN V. PACIFIC VINEGAR CO., Oreg., 37 Pac. Rep. 457.

25. CORPORATIONS—Guaranty of Bonds and Stock of other Corporations.—The charter of a land company gave it powers to acquire mining and timber lands to take the ore and timber therefrom and manufacture them, and to acquire rights of way "to export" its products, with all powers necessary to the full use and enjoyment of the powers granted; and authorized it "in furtherance" of those powers to effect "a temporary or permanent consolidation" with any railroad company: Held, that the land company had power to acquire stock of a railroad company, and guaranty its bonds and dividends on its preferred stock, in order to secure the construction of a railroad necessary to the success of the land company, thus accomplishing all that a complete consolidation could accomplish, with less risk and responsibility.—MARBURY V. KENTUCKY UNION LAND CO., U. S. C. C. of App., 62 Fed. Rep. 835.

26. CORPORATION— Guaranty of Contract.—A corporation organized under the law of Ohio for the purpose of making iron-work for mining plants has not power to guaranty the performance of another's contract for the erection of a mining plant, and the accompanying warranties, on the ground that the guaranty will secure a sale of the iron work used in the plant.—HUMBOLDT MIN. CO. V. AMERICAN MANUFACTURING, MINING & MILLING CO., U. S. C. C. of App., 62 Fed. Rep. 356.

27. CORPORATIONS— Receivers — Contracts with Directors.—Leases of property of a corporation to a director, who held nearly all its stock, were assented to or ratified by the other directors, who held all the remaining stock: Held, that a receiver of the corporation, appointed in a suit to foreclose a mortgage of its

property, could not contest the validity of the leases he not representing creditors, and no circumstances being alleged vesting in him equities to maintain such a suit or to question the lessee's rights.— TYLER V. HAMILTON, U. S. C. C. (Oreg.), 62 Fed. Rep. 187.

28. CORPORATIONS—Stock Controlled by Competing Corporation.—Stock in a railroad corporation of the State of Georgia was registered in the name of a corporation of another State, and its voting power was held by another foreign corporation, neither of which was a carrier; but the voting power was controlled by a carrier corporation of another State, which was in competition with the railroad company as to interstate traffic, though not as to matters domestic to the State of Georgia. No contract affecting such stock was shown to have been made by the parties in Georgia, or with any Georgia corporation: Held, that the right to vote on such stock was not affected by the provision of the constitution of Georgia declaring illegal and void all contracts or agreements with corporations which may lessen competition in their respective businesses, or encourage monopoly. — CLARKE V. RICHMOND & W. P. TERMINAL RAILWAY & WAREHOUSE CO., U. S. C. C. of App., 62 Fed. Rep. 328.

29. CRIMINAL EVIDENCE—Conspiracy — Instructions. —On a trial for conspiracy to commit a misdemeanor, the conspiracy must be established before proof of acts and declarations of a defendant, relative to the commission of the misdemeanor, is admissible.—TERRITORY V. TURNER, Ariz., 37 Pac. Rep. 368.

30. CRIMINAL LAW—Burglary — Constitutional Law—Code, § 828, which on a prosecution for burglary, casts the burden of proving the innocence of the entry on defendant, is not unconstitutional in raising a *prima facie* presumption of guilt from proof of the entry.—STATE V. WILSON, Wash., 37 Pac. Rep. 424.

31. CRIMINAL LAW—Confessions.—A confession made by defendant after he was told that whatever statements he made would be used as evidence against him is admissible in evidence against him.—CALLOWAY V. STATE, Ala., 15 South. Rep. 821.

32. CRIMINAL LAW—Form of Judgment.—A judgment in a criminal case need not run in the name of the people of the State, under Const. art. 6, § 20, which provides that the style of all process shall be "The People of the State of California," and that all prosecutions shall be conducted in their name and by their authority, as "process," as used in that section, does not include such a judgment.—EX PARTE AHERN, Cal., 37 Pac. Rep. 390.

33. CRIMINAL LAW—Homicide — Effect of Passion.—Passion arroused by mere words cannot reduce homicide below the crime of murder in the second degree. —SMITH V. STATE, Ala., 15 South. Rep. 843.

34. CRIMINAL LAW—Joint Trial.—Where four persons are jointly indicted, and one pleads guilty and the other three not guilty, this operates as a severance of the indictment, and the right of any of such persons to demand that the four be tried jointly ceases. — WOODLEY V. STATE, Ala., 15 South. Rep. 820.

35. CRIMINAL TRIAL—Competency of Juror.—A juror stated that he had formed and expressed an opinion as to the guilt or innocence of the defendant; that he still entertained that opinion; that it would require evidence to remove it; that he could not disregard that opinion until it was removed by evidence; that he could determine the facts with the same impartiality that he could had he heard nothing about it; that he was unbiased, except by the newspaper reports on his mind: Held, that a challenge or cause should have been sustained.— STATE V. MURPHY, Wash., 36 Pac. Rep. 420.

36. DEED — Delivery. — A fully-executed deed was found in the grantor's safe after his death. The safe was in the house of the grantee's wife, and was used by her and the grantor, each having a key thereto. On the death of the grantee his papers were taken in charge by his daughter, and just before her death the grantor promised her that he would look after the papers and affairs of the family; and she sent to him papers in a package, which was the same package in which the deed was found in the safe after his death. Before the death of the daughter the deed was seen in a box in which she kept papers and money, and with which the grantor had nothing to do: Held, that there was sufficient evidence of the delivery of the deed.—CUMMINGS V. GLASS, Penn., 29 Atl. Rep. 848.

37. DEED—Delivery.—W made a deed of land to B, an intended purchaser, and delivered it to his agent. B failed to take the land, and the agent sold it to R, and delivered to him the deed to B. The latter indorsed on the deed, "We, B do this day transfer the within deed to R." The deed was recorded, and R took possession. While in possession, claiming the land, he mortgaged it to H, and afterwards conveyed it to H in payment of the mortgage, and H went into possession by a tenant: Held, that, as the deed to B was not delivered, H did not have a legal title to the land.—BERNHEIM V. HORTON, Ala., 15 South. Rep. 822.

38. DIVORCE—Adultery.— To a charge of adultery, the wife cannot recriminate conduct of the husband that might have justified her leaving him, but was not ground for a divorce had she been innocent.—BAILEY V. BAILEY, N. H., 29 Atl. Rep. 847.

39. DIVORCE—Setting aside Decree. — When a complaint for divorce by a husband alleges his residence within the State, the wife, who appears and procures a decree in her favor, cannot afterwards attack such decree on the ground that the husband was a non resident.—FERRY V. FERRY, Wash., 37 Pac. Rep. 431.

40. DOMICILE—Distribution of Estate.—W was born in Virginia; went to Tennessee to seek employment, remaining one year; went to Mississippi, where he remained about a year; returned to Tennessee, where he stayed one month; and then on account of sickness, returned to Virginia, where he died: Held, that his domicile was in Virginia.—MAYO V. EQUITABLE LIFE ASSUR. SOC., Miss., 15 South. Rep. 791.

41. EQUITY—Contract — Abandonment. — Where a party to a contract for the sale of lands is in default, and is guilty of laches and negligence to perform the same, the other party may give a notice fixing a reasonable time for the performance of the contract, and has the right to treat the contract as abandoned if not complied with in such limited time.—CHABOT V. WINTER PARK CO., Fla., 15 South. Rep. 756.

42. EXECUTION. — Personal property held under an unsatisfied deed of trust, the condition of which has been broken, is not liable to execution on a judgment against the grantor.— TRICE V. WALKER, Miss., 15 South Rep. 786.

43. EXECUTION SALE.—An execution sale is not void because the second bidder, who was declared the purchaser, refused to take the goods, and the sheriff thereupon delivered them to the first bidder without a resale.—O'BRYAN V. DAVIS, Ala., 15 South. Rep. 860.

44. FEDERAL COURT— Illegal Combination of Railroad Companies.—Jurisdiction over an action against two railroad companies jointly operating a railroad, for injuries inflicted through negligence in its management, is not affected by the illegality of their combination.—BALTIMORE & O. R. CO. V. MEYERS, U. S. C. C. of App., 62 Fed. Rep. 367.

45. FEDERAL COURTS — Jurisdiction — Citizenship.— Where jurisdiction depends on diversity of citizenship, and the bill shows that complainant and one of the defendants are citizens of the same State, and such defendant, although he files a disclaimer, is not dismissed out of the case, the suit should be dismissed.— WETHERBY V. STINSON, U. S. C. C. OF APP., 62 Fed. Rep. 173.

46. FEDERAL COURTS — Jurisdiction — Suit against State Officer.—A Federal Court cannot take jurisdiction of a suit against a State officer to compel or coerce the State to perform its obligations or abide by its contracts, when the officer has neither committed nor

threatened to commit an injury to the property of complainant, but may take jurisdiction of a suit against an officer who, under the authority of an unconstitutional statute, has attacked or threatened to attack and injure the vested pecuniary rights of complainant in his property.—PRESIDENT, ETC., OF YALE COLLEGE v. SANGER, U. S. C. C. (Conn.), 62 Fed. Rep. 177.

47. FRAUDS, STATUTE OF—Sale of Standing Timber.—N bought from plaintiff, by verbal agreement, standing timber. After cutting what he wanted, he paid $100 to plaintiff, and sold to defendants the balance of the standing timber: Held that, as the contract between N and plaintiff was void under the statute of frauds, the same could derive no validity from the payment to the plaintiff, as such payment was an execution of the contract only to the extent of the timber cut.—NELSON v. LAWSON, Miss., 15 South. Rep. 798.

48. FRAUDULENT COMPROMISE — Knowledge of Parties.—Where a debtor, with intent to defraud his creditors, compromises claims with his debtors, who have no knowledge or notice of such fraudulent intent, the compromise will not be set aside.—ANDERSON v. PILGRAM, S. Car., 19 S. E. Rep. 1002.

49. GUARDIAN — Judgment—Collateral Attack.—In an action by a guardian on the bond of a former guardian who had been removed, an objection by defendants that the court had no jurisdiction to remove such former guardian, and appoint plaintiff, cannot be sustained, being a collateral attack on the judgment.—DEEGAN v. DEEGAN, Nev., 37 Pac. Rep. 360.

50. GUARDIAN—Use of Private Funds for Ward's Support.—Where a guardian uses his own funds for the support of his wards, under such circumstances as that an order for the sale of their land would have been granted for such purposes if it had been applied for in advance of the expenditures, a sale of sufficient of such real estate to reimburse him will be ordered after his office as guardian has expired, and the land has passed into the hands of a trustee for management.—BELLAMY v. THORNTON, Ala., 15 South. Rep. 831.

51. HOMESTEAD—Title to New Homestead.—One who acquired a homestead right in property as surviving husband sold the same to the owner of the fee, and invested the proceeds in a new homestead, the title to which was taken in the name of his second wife: Held, that his creditors had no ground of complaint, and could not subject the new homestead to payment of their judgment, so far as it came within the homestead limits provided by law.—GREEN v. ROOT, U. S. D. C. (Iowa), 62 Fed. Rep. 191.

52. HOMESTEAD EXEMPTIONS — Waiver of Exemption Right.—Where personal property that is exempt from forced sale to the head of a family, under our constitution, is simply levied upon by attachment or other process of law, the mere silence or failure of the party entitled to such exemption to assert or claim it until there is an actual attempt at forced sale of such property, under the process of some court, cannot constitute a waiver of the right, or work an estoppel to its assertion when the inhibited forced sale is actually attempted.—MCMICHAEL v. GRADY, Fla., 15 South. Rep. 765.

53. INJUNCTION.—That a person is about to inclose the uncultivated land of another with a fence, no irreparable damage being alleged, does not warrant issuing an injunction.—LUTCHER v. NORSWORTHY, Tex., 27 S. W. Rep. 630.

54. INJUNCTION — Bond — Water Rights.—Where defendant, by means of a ditch, appropriated to his own use the water in a stream, and plaintiff obtained a judgment entitling him to the use of a part of the water, and secured an injunction restraining defendant from taking more than a certain amount, the court erred in refusing to allow a *supersedeas* bond to stay the injunction pending appeal.—ELLIOTT v. WHITMORE, Utah, 37 Pac. Rep. 459.

55. INJUNCTION — Preliminary Injunction.—Granting or continuing preliminary injunctions is a matter within the discretion of the trial court, and will be disturbed only for abuse of discretion.—GRANNIS v. LORDON, Cal., 37 Pac. Rep. 375.

56. INSOLVENCY—Unlawful Preference.—In an action against a debtor and his grantee to adjudge the debtor an insolvent the court has power not only to adjudge the debtor an insolvent, but also to set aside the conveyance to the grantee as giving him an unlawful preference.—DUMLER v. BERGMANN, Md., 29 Atl. Rep. 826.

57. INSURANCE—Proofs of Loss—Description of Property.—Under a policy requiring, if a fire should occur, a statement of the cash value of each item of the property and the amount of loss thereon, where the property insured is 100 bales of cotton, it is sufficient to state the number and weight of each bale and the value in the aggregate.—ÆTNA INS. CO. v. PEOPLE'S BANK OF GREENVILLE, U. S. C. C. of App., 62 Fed. Rep. 222.

58. INTEREST—Judgment — Federal Court.—Interest cannot be recovered in the United States Circuit Court upon a judgment rendered in the court of claims; the question being incidental to the original suit, and the court of claims being the proper forum for its determination.—BUNTON v. UNITED STATES, U. S. C. C. (Pa.), 62 Fed. Rep. 171.

59. JUDGMENT—Action to Set Aside.—A decree of the Supreme Court will not be set aside for perjury and fraud unless the perjury and fraud are collateral to the questions examined and determined in the action.—FRIESE v. HUMMEL, Oreg., 37 Pac. Rep. 458.

60. JUDGMENT AGAINST INFANT.—A judgment rendered against an infant without the appointment of a guardian *ad litem* is voidable only; and if, after the judgment is entered and the infant becomes of age, he makes no objection thereto, he waives his right to make such objection.—CHILDS v. LANTERMAN, Cal., 37 Pac. Rep. 882.

61. JUDGMENT BY DEFAULT.—Where a defendant has not answered, and the court, before reaching the case, announces that the civil docket will not be taken up again, the court may afterwards during the term, and without notice to defendant, render judgment by default, though defendant had a good defense, and was present in court to ask leave to defend when the continuance was announced.—NATIONAL FERTILIZER CO. v. HINSON, Ala., 15 South. Rep. 844.

62. JUDGMENT ON NOTE BARRED BY LIMITATION.—The court may, in its discretion, open a judgment entered by confession on a judgment note not under seal, where it appears on the face of the note that at the time judgment was entered the statute of limitations was a bar to the debt.—BATES v. CULLUM, Pa., 29 Atl. Rep. 870.

63. JUDGMENT—Opening after Term—Agreement of Attorneys.—A judgment regularly entered pursuant to an agreement of the attorneys for the parties, filed in the case, cannot be opened, after final adjournment of the term, on the ground that the agreement was unauthorized.—CRAVEN v. CANADIAN PAC. R. CO., U. S. C. C. (Mass.), 62 Fed. Rep. 170.

64. JUDGMENT—Proceedings in Another State—Effect.—While the courts of this State must give full faith and credit to the judicial proceedings of sister States, the judgment of the courts of sister States are not, like domestic judgments, conclusive on the point of jurisdiction; but, when such judgments are attempted to be enforced here, lack of jurisdiction, either over the person against whom judgment is pronounced or in respect to the subject matter of the suit, may be shown.—SUPREME COUNCIL OF ROYAL ARCANUM v. CARLEY, N. J., 29 Atl. Rep. 813.

65. JUDGMENT—Revival.—Judgment entered against "M K and A K" was revived by agreement, and entered against "M K and A K," and thereafter was again revived by agreement, and entered against "M K and A K, his wife:" Held that, the presumption

being that coverture had taken place since the previous revival, and that the latter judgment in that form was regular and authorized, and there being nothing on the record to rebut the presumption, previous coverture could not be proved as a defense on *scire facias* to revive the last judgment.—LAUER v. KETNER, Penn., 27 Atl. Rep. 908.

66. JUDGMENT—Time for Making Motion. — A judgment void for want of jurisdiction of the person of defendant, where the invalidity does not appear from the judgment role, may be set aside on motion within a year, under Code Civ. Proc. § 473, providing that when the summons is not personally served the court may allow a defendant to answer to the merits within one year after judgment.—PEOPLE v. TEMPLE, Cal., 37 Pac. Rep. 414.

67. LANDLORD'S LIEN—Title to Crop.—Where a landlord has a lien for rent on a crop of cotton, and the tenant gives bales sufficient thereof to cover the rent and so notifies the landlord, who instructs the tenant to sell it for his account, this is such a constructive delivery as will transfer the legal title to the landlord. —BELSER v. YOUNGBLOOD, Ala., 15 South. Rep. 863.

68. LANDLORD AND TENANT — Leakage from Water Pipe.—In an action by tenants against a landlord for injuries to goods caused by the leakage of a water pipe, it appeared that plaintiffs rented the lower story of the building, and that defendant had control of the upper room in which the leakage occurred. The only stopcockfor the water was on the pavement, though the water-works board had established a rule that a stop cock should be provided in each building. Plaintiffs were not informed of water pipe, though it could be seen by ordinary examination, nor did they request that the water be cut off. Plaintiffs testified that they thought the water was cut off: Held, that defendant was not liable on account of his failure to have the water cut off, as it was equally the duty of plaintiffs to attend thereto.— BUCKLEY v. CUNNINGHAM, Ala., 15 South. Rep. 826.

69. LICENSE—Conveyance of Standing Wood.—An instrument purporting to convey all the standing wood on a certain lot of land, "with two years from the date hereof to cut and remove said wood in," does not convey any interest in the land, but it is a mere license or executory contract, revocable at any time before the timber is cut; and it is revoked by the grantor's conveyance of the land to another.—FISH v. CAPWELL, R. I., 29 Atl. Rep. 840.

70. LIFE INSURANCE—Construction of Policies—Beneficiaries.—In 1870, the insured took out a policy of life insurance, payable to his legal representatives, "for the benefit of his widow, if any, and his then surviving children, in equal shares to each." At his death in 1892, he left a widow, by a second marriage, one daughter, and a granddaughter, the child of another deceased daughter: Held, that the widow and surviving daughter took one-half each of the policy, and that the granddaughter was not a beneficiary within the meaning of the policy.—SMALL v. JOSE, Me., 29 Atl. Rep. 976.

71. LIMITATIONS—Claims against County. — A claim against a county will be barred by the statute of limitations where an action is not brought thereon within six years after it is rejected by the commissioners.—HONEA v. BOARD OF SUP'RS OF MONROE COUNTY, Miss., 15 South. Rep. 789.

72. MANDAMUS—Compelling Allowance of Appeal.—A Circuit Court will not be compelled by *mandamus* to allow an appeal from a denial of a motion to consolidate causes (that being wholly within its discretion), nor from a denial of a petition to be made a party to a cause, filed by one not a necessary party thereto, and whom, even if a proper party, it was a proper exercise of discretion to exclude, because he was prosecuting other proceedings for the relief sought, wherein all his rights would be examined and protected.—LEWIS v. BALTIMORE & L. R. Co., U. S. C. C. of App., 62 Fed. Rep. 218.

73. MARRIAGE—Proof by Hearsay.—Whether the parents of a child born 87 years ago were married, there being no living witness or documentary evidence may be proved by hearsay.—IN RE PICKENS' ESTATE, Penn., 29 Atl. Rep. 875.

74. MASTER AND SERVANT — Fellow-servants—Substitute.—A substitute hired by an employee stands in the employee's place, with all of its responsibilities and liabilities, so far as the master is concerned; and a fellow servant with the employee is a fellow-servant with the substitute, though no contractual relation exist between the substitute and the master, and though the employee alone is responsible for the substitute's wages.—ANDERSON v. GUINEAN, Wash., 37 Pac. Rep. 449.

75. MASTER AND SERVANT — Injury to Employees—Statutory Provisions.—Comp. Laws Kan. 1879, p. 784, § 4914, making a railroad company liable "for all damages done to any employee of such company in consequence of any negligence of its agents, or by any mismanagement of its engineers or other employees," having been construed by the Supreme Court of the State as not limited to injuries caused in the movement of trains, is properly applied, in the federal courts, to a case where one employee was injured by negligence of another while both were engaged, in a roundhouse, in putting a recently-arrived engine in condition for immediate use.—CHICAGO, R. I. & P. RY. CO. v. STAHLEY, U. S. C. C. of App., 62 Fed. Rep. 363.

76. MORTGAGE—Foreclosure.—A grantee of mortgaged premises, who has assumed the mortgage, is liable, in an action of foreclosure for a deficiency judgment.—WILLIAMS v. NAFTZGER, Cal., 37 Pac. Rep. 411.

77. MORTGAGE FORECLOSURES — Possession. — Code Proc. § 519, which authorizes the purchaser at a judicial sale to take possession on the day of sale until a resale or redemption, applies to mortgage foreclosure sales. —DEBENTURE CORPORATION, LIMITED, OF LONDON v. WARREN, Wash., 37 Pac. Rep. 451.

78. MUNICIPAL CORPORATION—City Improvements.—Where the council, by resolution of intention, decides to "pave" a street, the board of public works has no authority to add thereto curbing and sidewalks.—MCALLISTER v. CITY OF TACOMA, Wash., 37 Pac. Rep. 447.

79. MUNICIPAL CORPORATIONS—Death by Act of Mob. —In the absence of a statute giving a remedy, a city is not liable for damages for the taking of human life by a mob, although its officers may have been negligent in preserving the public peace.—CITY OF NEW ORLEANS v. ABBAGNATO, U. S. C. C. of App., 62 Fed. Rep. 240.

80. MUNICIPAL CORPORATION—Streets—Surface Water. —Where surface water, owing to the natural conformation of the country, has formed for itself a definite channel, in which it is accustomed to flow, a city is bound to build culverts, sufficient to discharge the ordinary flow of water, in grading streets.—LOS ANGELES CEMETERY ASS'N v. CITY OF LOS ANGELES, Cal., 37 Pac. Rep. 375.

81. MUNICIPAL CORPORATION — Streets — Telegraph Poles.—A city, having the right to regulate the use of its streets, may impose a tax of $2 per pole upon a telegraph company for the privilege of erecting poles therein.—POSTAL TEL. CABLE CO. v. MAYOR, ETC. OF BALTIMORE, Md., 29 Atl. Rep. 819.

82. MUTUAL BENEFIT SOCIETY — Waiver of Stipulations.—Where the constitutions and by-laws of a mutual benefit association do not require the beneficiary to make proofs of death of a member, the failure of the subordinate lodge to make a report of the cause of death of a member as required by the constitution and by-laws, does not affect the right of the beneficiary to recover.—SUPREME COUNCIL OF CATHOLIC BENEVOLENT LEGION v. BOYLE, Ind., 37 N. E. Rep. 1105.

83. NEGOTIABLE INSTRUMENT—Assignment of Decedent's Note—Right of Action.—Unless it is shown that the estate of a decedent owes no debts, and has no administrator, a suit on a note which belonged to the estate cannot be maintained by one who claims title

thereto by transfer from the heirs and distributees.—KNIGHT V. KNIGHT, Ala., 15 South. Rep. 884.

84. NEGOTIABLE INSTRUMENT—Check—Presentation.—Defendant drew his check in favor of N in payment of a note. At the time, the bank was indebted to him, for services and for checks, in his hands, to an amount which, with his balance, was more than the check was for. Before drawing the check, defendant arranged with the cashier of the bank that it would be paid. When defendant gave the check to N, on June 16, 1891, he directed him to go to the bank, which was across the street, and get his money. Instead, defendant indorsed the check to plaintiffs, and sent it to them at Philadelphia, and the bank suspended June 22, 1891, before it was presented for payment: Held, that defendant was discharged from liability on the check.—INDUSTRIAL TRUST, TITLE & SAV. CO. V. WEAKLEY, Ala., 15 South. Rep. 854.

85. NEGOTIABLE INSTRUMENTS — Consideration.—By an instrument dated and signed, the maker promised, for value received to pay N, or her order a sum certain, "to be allowed at my decease, with interest at five per cent. annually." N was the maker's daughter, was unwed at the date of the instrument, and lived in his family till her death: Held, a good note, importing *prima facie*, good consideration.—MARTIN V. STONE, N. H., 29 Atl. Rep. 845.

86. PARTITION—Compensation for Improvement.—A plea by defendants in possession, setting up the statutes of limitations and adverse possession, was overruled, on the ground that they were rightfully in possession as co-tenants: Held, that any equities they might have as co-tenants to compensation for improvements might be allowed, without a cross bill, as incidental to the partition, under the general prayer for relief.—MC CLASKEY V. BARR, U. S. C. C. (Ohio), 62 Fed. Rep. 209.

87. PARTNERSHIP—Assumption of Partner's Debt.—A partnership, requiring more capital, took in a new partner, J, with money advanced him by his father, to protect whom the articles stipulated that, if the firm dissolved, after payment of debts, J should be repaid his money before the other two received anything, and they guarantied that he should receive the amount invested by him: Held, that the loan was made to J, not to the firm, and the agreement was between J and his partners, and hence the firm could not, on failing, confess judgment to the father for the debt.—JAMES V. VANZANDT, Penn., 29 Atl. Rep. 879.

88. PLEADING — Amendment.—Allowing defendant to file an answer on the merits, after the issue in an answer setting up the pendency of another action has been decided against him, is within the jurisdiction of the court.—STATE V. SUPERIOR COURT OF THURSTON COUNTY, Wash., 37 Pac. Rep. 454.

89. PRINCIPAL AND AGENT — Accounting.—When one sues his agent for moneys received by the agent for his use, he has the burden of proof to show the amount received and not accounted for.—ANDERSON V. FIRST NAT. BANK OF GRAND FORKS, N. Dak., 59 N. W. Rep. 1029.

90. PRINCIPAL AND AGENT — Authority.—Articles of copartnership stipulated that no debts should be contracted in the firm name, unless with the written consent of all the partners; that B should be the general manager of the business, and be authorized to sign all notes, checks, drafts, and other obligations, and execute all papers, necessary for conducting the business. For three years a large business was done, debts contracted by the manager and paid, and notes given and renewed in the firm name by the manager, without, in any case, the written consent of the partners: Held, that the requirement of such consent might be construed as a restriction on the partners only,—not on their manager.—LERCH V. AMERICAN PLUMBAGO MIN. CO., Penn., 29 Atl. Rep. 890.

91. PRINCIPAL AND AGENT — Authority of Agent—Retaining Attorney.—An agent with authority to collect money and notes from the local agents of and purchasers from his principal has authority to retain an attorney to collect a claim and authorize him to give an indemnity bond on the issuance of an execution.—SWARTZ V. D. S. MORGAN & CO., Penn., 29 Atl. Rep. 974.

92. PRINCIPAL AND AGENT — Contract—Ratification.—In order to show a ratification by a principal of the unauthorized act or contract of an agent by the acceptance and enjoyment of its benefits, it must appear that the principal had knowledge of the material facts, or that he intentionally accepted the benefits without inquiry.—JEWELL NURSERY CO. V. STATE, S. Dak., 59 N. W. Rep. 1025.

93. RAILROAD COMPANIES—Killing Stock.—A declaration against a railroad company, alleging that it was the duty of the company, under the act of 1887, ch. 3742, to erect and maintain suitable fences on the sides of its railroad track, sufficient to exclude and turn live stock therefrom, and that the company failed to erect and maintain such fence at a point on the road not in a town or city or at a public road crossing, and, by means of such neglect, plaintiff's cows, of certain value mentioned, strayed upon the track at a point not fenced, and were killed by a passing train of the company, states a good cause of action.—JACKSONVILLE, T. & K. W. RY. CO. V. PRIOR, Fla., 15 South. Rep. 760.

94. RAILROAD COMPANIES — Mortgage Foreclosure — Application of Proceeds.—The order appointing a receiver of a railroad in a foreclosure suit authorized him to pay balances due to other carriers; and leave was afterwards granted him, without objection, to issue certificates to meet obligations. Interveners filed a claim for such balances accruing before the receiver's appointment, praying payment out of earnings, and general relief; but no proceedings were had thereon until after sale of the road on foreclosure. The receiver's earnings had been absorbed by running expenses, and there had been no diversion of income to pay interest: Held, that an application of the interveners for payment out of the proceeds of sale was properly granted.—FINANCE CO. OF PENNSYLVANIA V. CHARLESTON, C. & C. R. CO., U. S. C. C. OF APP., 62 Fed. Rep. 205.

95. RECEIVERS—Deposits and Payments.—When a receiver of a corporation deposits to his credit, as receiver, money belonging to an individual, the corporation is under obligation to repay such person, and therefore is not prejudiced by the giving of a check by the receiver to such individual in payment of the obligation.—ECCLES V. DROVERS' & MECHANICS' NAT. BANK, Md., 29 Atl. Rep. 963.

96. RECEIVERS — Right to Appeal.—A receiver of a railroad, appointed in a suit to foreclose a mortgage thereon, against whom a decree is rendered for damages for injuries to an employee from negligence in operating the road, is entitled to an appeal therefrom, when allowed by the court.—THOM V. PITTARD, U. S. C. C. of App., 62 Fed. Rep. 282.

97. RELIGIOUS SOCIETY — Injunction.—Where subscriptions are secured for the erection of a church at a particular place as a memorial to a certain person, equity will enjoin the church society from tearing down such building and removing the material to a different place, for use in a building to be erected by such society at the latter place.—CUSHMAN V. RECTOR, ETC., OF CHURCH OF GOOD SHEPHERD OF RADNOR, Pa., 29 Atl. Rep. 872.

98. REMOVAL OF CAUSES—Federal Questions.—A suit to enforce a contract for sale of land, brought by the vendor, claiming title under a grant by act of congress, against the purchaser and another to whom he had conveyed, who contests complainant's claim under such act, presents a case arising under the laws of the United States, which is removable on petition of such defendant alone, although the purchaser, not joining in the petition, is not a merely nominal party, and complainant is entitled to proceed to judgment against him.—SOUTHERN PAC. R. CO. V. TOWNSEND, U. S. C. C. (Cal.), 62 Fed. Rep. 161.

99. REMOVAL OF CAUSES — Order of State Court.—A petition and bond upon an application to remove a case from a State Court to a Federal Court are based upon a right of purely statutory, and must in their terms strictly comply with the provisions of the statute before the State Court is ousted of its jurisdiction. The State Court has a legal discretion to decline to accept the petition and bond when they are not in compliance with the statutory requirements, and to retain jurisdiction of the case.—HAYES v. TODD, Fla., 15 South. Rep. 752.

100. RES JUDICATA — Foreclosure of Mortgage.—The foreclosure of a mortgage on lands situated in another State to secure a bond is no bar to an action on the bond where the defendants in the foreclosure action were non-resident of the State where the action was brought, and were not served with notice, since no personal judgment was rendered against them.—HOWARD v. MCNAUGHT, Wash., 37 Pac. Rep. 455.

101. SALE — Action for Price.—In an action for the price of wood under an alleged contract whereby defendant agreed to take from plaintiff wood delivered on the bank of the T river, defendant to furnish a barge on which to load the wood, and plaintiff to load it, if plaintiff complied with the contract, but defendant failed to furnish a barge, and the wood was burned without plaintiff's fault, plaintiff could recover.—AMERICAN OAK EXTRACT CO. v. RYAN, Ala., 15 South. Rep. 807.

102. SALE—Conditional Sale.—Where personal property is sold conditionally, the title to remain in the vendor until the price is paid, the vendor, by suing for such price and obtaining judgment, does not waive his right to retake the property.—THOMASON v. LEWIS, Ala., 15 South. Rep. 830.

103. SALE—Title — Rights of Purchaser.—Where part of certain corn in a crib is sold, and has not been separated or measured, the legal title thereto does not pass, and the purchaser has no right to break open the crib and take a quantity equal to the amount sold.—GRESHAM v. BRYAN, Ala., 15 South. Rep. 849.

104. SALE—Validity.—Plaintiff sold to defendant certain trees. It was provided that, on account of a disease with which the trees were affected, a certain percentage should be excepted. Defendant selected the trees, and they were shipped to him in another county. On account of an ordinance of the county to which the trees were shipped, adopted after the sale, defendant was prohibited from planting therein any of the trees which were diseased, and returned the same to plaintiff, who refused to receive them. Held, that plaintiff could recover for all of the trees selected by and shipped to defendant.—GRAY v. LONG, Cal., 37 Pac. Rep. 380.

105. SALE—Warranty—Measure of Damages.—Under Civ. Code. § 3313, the damages for breach of warranty of the quality of fruit trees is the difference in the value between the kind of trees warranted and the trees actually delivered, at the time those delivered first bore fruit.—SHERER v. PARK NURSERY CO., Cal., 37 Pac. Rep. 412.

106. SALE ON MARGINS—Gambling Contracts.—Const. art. 4, § 26, provides that all contracts for the sale of corporate shares on margin, or for future delivery, shall be void, and any money paid on such contracts may be recovered by the party having it: Held, that whenever the purchaser of stock paid the vendor, or his broker a percentage of the price upon an agreement that the stock should be held as security for the balance, the amount so paid was "margin."—SHEEHY v. SHINN, Cal., 37 Pac. Rep. 393.

107. SCHOOL DISTRICT— Employment of Teacher.—A contract duly executed between the proper officers of a school district and another person, by the terms of which said person is employed as a teacher in a public school in said district, is void where such person at the time of making the contract, holds no certificate of authority to teach in the county where the district is located.—HOSMER v. SHELDON SCHOOL DIST. NO 2 OF RANSOM COUNTY, N. Dak., 59 N. W. Rep. 1035.

108. STREET IMPROVEMENTS — Ordinance.— Under a city charter, which requires an order for public improvements to be passed by a two-thirds vote of the council if a remonstrance of property owners has been made against it, an order adopted by a *viva voce* vote is void.—BUCKLEY v. CITY OF TACOMA, Wash., 37 Pac. Rep. 446.

109. TAX TITLE—Validity.—One who, having no interest in land, has it listed for taxes in his name, makes default in the payment of the taxes, bids in the property at the tax sale, and receives the sheriff's deeds therefor, acquires no title to the land.—POPE v. WILDER, S. Car., 19 S. E. Rep. 996.

110. TELEGRAPH COMPANIES— Limiting Liabilities.—It is no sufficient affidavit of defense to a statement for failure to transmit a telegram that the contract stipulated against liability for default on other lines than defendant's own; that defendant transmitted the message promptly over its own lines to the terminus, and delivered it for transmission to the A cable company and the error, if any, occurred beyond the terminus of defendant's lines. The affidavit should state when defendant did send the message, where its terminus is, and where it delivered the message to the cable company.—CONRAD v. WESTERN UNION TEL. CO., Penn., 29 Atl. Rep. 888.

111. TENANCY IN COMMON — Husband and Wife—Divorce.—Where husband and wife acquire an estate by the entirety, and are afterwards divorced, they then become tenants in common.—DONEGAN v. DONEGAN, Ala., 15 South. Rep. 823.

112. VENDOR AND PURCHASER — Clear Title.—A title conditioned that no mill, factory, brewery, or distillery shall be erected on the premises is not a good and marketable title, clear of all incumbrances.—BATLEY v. FOERDERER, Pa., 29 Atl. Rep. 868.

113. VENUE — Presumption on Appeal.— 2 Comp. Laws 1888, § 3199, authorizes the court to change the place of trial to the nearest court when the parties do not agree on the court to which the change shall be made: Held, that where the court so transfers a cause, and the record does not show the contrary, it will be presumed that the parties did not agree as to a court.—ELLIOT v. WHITMORE, Utah, 37 Pac. Rep. 461.

114. WATERS— Pollution.—A non-riparian appropriator of the water of a stream has no right of action for the pollution of the water of said stream by a prior riparian owner, who, in the interest of sanitary conditions, discharges sewage into said stream.—CONRAD v. ARROWHEAD HOT SPRINGS HOTEL CO., Cal., 37 Pac. Rep. 386.

115. WILL—Creation of Remainders.—Under a devise of land to the wife and children of L now living, and to any other legitimate child or children which may be hereafter born to him, the wife takes an estate for life, and the children of L a vested remainder in fee; and, in case he shall have other children, the remainder must open for their benefit.—DOWNES v. LONG, Md., 29 Atl. Rep. 827.

116. WILL—Probate of Foreign Will.—Where testator made his will while domiciled in Illinois, and owned land there, and had notes against persons residing there at the time of his death, the proper Probate Court of Illinois had jurisdiction to probate it, though testator was domiciled in Vermont at the time of his death.—WALTON v. HALL'S ESTATE, Vt., 29 Atl. Rep. 803.

117. WILLS—Division of Residue—Per Capita.—Testatrix provided that the remainder of her estate should "be divided among my nephews, and nieces, to wit," the heirs of G, the heirs of her dead brother J, and the heirs of her brother W, and —, "each to take share and share alike." Six of her twenty nephews and nieces were thus excluded, the parents not being mentioned at all: Held, that the distribution was *per capita*.—IN RE SCOTT'S ESTATE, Pa., 29 Atl. Rep. 877.

Central Law Journal.

A LEGAL WEEKLY NEWSPAPER.
Published by
Central Law Journal Company,
919 OLIVE ST., ST. LOUIS, MO.

To whom all communication should be addressed.
Subscription price, FIVE DOLLARS per annum, in advance. Single numbers, TWENTY-FIVE CENTS.

Entered at the post-office, St. Louis, Mo., as second-class matter.

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